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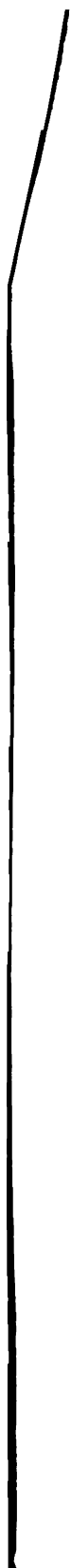
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OPINIONS
OF
THE ATTORNEY-GENERAL
OF
PORTO RICO
TO THE
GOVERNOR, THE HEADS OF DEPARTMENTS,
THE JUDICIARY AND OTHER OFFICIALS

IN RELATION TO THEIR OFFICIAL DUTIES AND CONSTRUING AND EXPLAIN-
ING THE INSULAR CONSTITUTION AND LAWS

THERE ARE ALSO INCLUDED THE ANNUAL REPORTS OF THE ATTORNEY-
GENERAL TO THE GOVERNOR OF PORTO RICO AND TO THE
ATTORNEY-GENERAL OF THE UNITED STATES

By JAMES S. HARLAN
ATTORNEY-GENERAL OF PORTO RICO

VOLUME I.

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THE INSULAR GOVERNMENT
EXECUTIVE DEPARTMENT

GOVERNOR
WILLIAM H. HUNT.

SECRETARY
CHARLES HARTZELL.

ATTORNEY-GENERAL
JAMES S. HARLAN.

TREASURER
WILLIAM F. WILLOUGHBY.

AUDITOR
JOHN R. GARRISON.

COMMISSIONER OF THE INTERIOR
WILLIAM H. ELLIOTT.

COMMISSIONER OF EDUCATION
SAMUEL M. LINDSAY.

PREFACE.

THE Legislative Assembly having directed that the opinions of the Attorney-General be printed both in English and in Spanish it has been thought expedient in preparing this volume for publication to omit the large number of opinions rendered relating to laws that have subsequently been repealed; but an effort has been made in selecting the opinions to be published to indicate the general character of the questions that have arisen in this formative period in the history of the Insular Government.

J. S. H.

San Juan, March 17, 1903.

JUDICIAL DEPARTMENT.

THE SUPREME COURT OF PORTO RICO.

CHIEF JUSTICE

JOSÉ S. QUINONES.

ASSOCIATE JUSTICES

JOSÉ C. HERNANDEZ,	LOUIS SULZBACHER,
JOSÉ M. FIGUERAS,	JAMES H. McLEARY.

FISCAL

EMILIO DEL TORO.

MARSHAL

SAMUEL C. BOTHWELL.

DISTRICT COURTS.

SAN JUAN.	PONCE.
JUAN MORERA MARTINEZ, <i>President.</i>	YSIDORO SOTO NUSSA, <i>President.</i>
FRANK H. RICHMOND, JOSÉ TOUS Y SOTO, <i>Associates.</i>	RAFAEL SANCHEZ MONTALVO, E. B. WILCOX, <i>Associates.</i>
JESUS M. ROSSY, <i>Fiscal.</i>	FRANCISCO PARRÁ Y CAPÓ, <i>Fiscal.</i>
LUIS MENDEZ VAZ, <i>Secretary.</i>	LUIS GAUTIER, <i>Secretary.</i>
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JUAN ARROYO MESTRE, <i>Secretary.</i>	JOSÉ E. FIGUERAS, <i>Secretary.</i>
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LUIS CAMPILLO Y ABRAMS, <i>Fiscal.</i>	
JOSÉ G. GONZALEZ, <i>Secretary.</i>	

VOLUME I.

CONTAINING

OPINIONS AND ANNUAL REPORTS OF ATTORNEY-GENERAL

JAMES S. HARLAN

AND OPINIONS OF

**FRANK FEUILLE,
ASSISTANT ATTORNEY-GENERAL.**

DEPARTMENT OF JUSTICE.

ATTORNEY-GENERAL,
JAMES S. HARLAN.

ASSISTANT ATTORNEYS-GENERAL,
EMILIO DEL TORO.
FRANK FEUILLE.

CHIEF CLERK AND DISBURSING OFFICER,
FRANCISCO ACOSTA.

INTERPRETER AND TRANSLATOR AND CHIEF OF BUREAU
OF CRIMINAL STATISTICS,
MIGUEL OLMEDO.

CLARENCE W. REYNOLDS,
Secretary to Attorney-General.

HENRY L. LYONS,
Chief English Stenographer.

MARTIN ERGUI,
Chief Spanish Stenographer.

ARTURO MUÑIZ,
Keeper of the Archives.

FRANCISCO DEL VALLE, JR.,
Health Attorney.

J. M. YOUNG,
Librarian.

EDUARDO MARIN,
Pardon Clerk.

ANTONIO LALOMA,
Registrar.

FERNANDO DEL TORO,
Correspondence Clerk.

OPINIONS
OF THE
ATTORNEY-GENERAL OF PORTO RICO.

CLAIM AGAINST THE MILITARY AUTHORITIES.

Upon the particular facts stated, suggestions are made as to the proper distribution of rents among the heirs of a deceased landlord.

OFFICE OF THE ATTORNEY-GENERAL,

March 15, 1901.

SIR: I return herewith as requested in the eleventh endorsement the papers relating to the claim of Mrs. Manuel Besosa and her son Harry, against the war department, for rent under the terms of a lease of certain property at Ponce upon which the national government seems to have erected an ice plant and pumping station.

I have considered the matters involved in the fifth, eighth and ninth endorsements as requested, and am of the opinion that under the laws now in force in this island the war department may properly pay to Mrs. Besosa seven-eighths of the rent due; and if her child is under age may properly pay the other one-eighth to her as the legal administratrix of the child. If he is of lawful age the remaining one-eighth should be paid directly to him.

The certified copy of the abstract of title to the property in question seems to indicate with sufficient clearness that the title rests in the wife and this child in the proportions above indicated. The child's title is by inheritance and the title of the widow partly by inheritance and partly by conveyance to her by the remaining children of their respective proportions of the inherited estate. The reference by her in the fifth endorsement to herself as the "legal administratrix" of the property of the

minor child does not mean that she is the administratrix of the husband's estate by appointment of a court, but has reference to her legal relation under the law to the estate of the minor child. Article 159, chapter 3, of the civil code in force in Cuba, Porto Rico and the Philippines, a translation of which was published by the division of customs and insular affairs of the war department in October, 1899, provides as follows:

The father, or, in his absence the mother, is the legal administrator of the property of the children who are under their authority.

With reference to rent accruing after the decease of a husband owning property in fee, I find the law to be substantially the same here as it is generally throughout the United States. In other words, here, as there, the heirs are entitled to the rent.

Upon the documents submitted to me it appears that Mrs. Besosa claims only three-fourths of the rent for herself and concedes one-fourth to her son Harry. Upon proper receipts being given the payment may be made in those proportions, that is, three-fourths to her personally and one-fourth to her as administratrix of the son if a minor, and if not a minor the other fourth directly to the son. But as I understand these papers, she is really entitled to seven-eighths and the son to but one-eighth of the rent.

Very respectfully,

JAMES S. HARLAN.

The QUARTERMASTER, U. S. A.,

District of Porto Rico.

WRITTEN CONTRACTS NOT TO BE VARIED BY PAROL.

It is a general rule of law that all previous understandings and intentions are merged in the formal written agreement when executed by the parties thereto. The Commissioner of the Interior is therefore without power to adjust the compensation of a public contractor on the basis of such previous understandings but is controlled by the terms of the written instrument.

OFFICE OF THE ATTORNEY-GENERAL,

March 16, 1901.

SIR: Accompanying your endorsement of the 15th relating to the claim made by Edwin Thacher, Esquire, in connection with the building of steel bridges over the Jacaguas and Guayo

Rivers, were what purports to be a copy of the original contract together with correspondence relating to the matter between Mr. Thacher and the president of the board of public works.

While it may be true as he states that the tax levied by the city of Ponce took Mr. Thacher by surprise, nevertheless I am unable to see from the terms of the written contract any suggestion upon which an equitable view of his claim may be based. The contract is so definite and complete in form and terms as in my judgment to prohibit you from reaching any adjustment with Mr. Thacher outside of its written provisions. In this connection I have not overlooked the statement that Mr. Thacher intended to prosecute this work upon a submitted estimate of the cost of materials and to take his profit out of the 15 per cent added. But all such previous understandings and intentions were merged in the written agreement between him and the military government. To illustrate my meaning in a practical way let it be supposed that the materials instead of costing as much as originally estimated by Mr. Thacher had cost much less. It would not have been competent in such case under this contract for the insular government to make any demand against Mr. Thacher for a reduction in the contract price by reason of the alleged general previous understanding that his profits should rest in the 15 per cent only.

The rule is that written contracts cannot be varied, changed, altered or amended by parol; and upon the papers submitted to me I see nothing that would justify you in reading into the instrument any understanding as to the nature of the bid, which Mr. Thacher may have had before the execution of the formal contract. A departure from the terms of the written contract in this case would simply open the way to a departure from written contracts in all cases.

While I have not been asked to examine into the question, it is doubtful in my judgment whether the tax levied by and paid to the city of Ponce may lawfully be retained from Mr. Thacher, and I suggest that it may be worth his while to have his solicitor look into that question.

Very respectfully,

JAMES S. HARLAN.

THE COMMISSIONER OF THE INTERIOR.

THE DIRECTOR OF CHARITIES.

The jurisdiction of the Commissioner of the Interior over the Director of Charities ceased on March 1, 1901, and the Director became responsible to the Executive Council.

Under the act entitled "An Act to abolish the Board of Charities of Porto Rico, to create the office of Director of Charities, and for other purposes," approved January 31, 1901, the administrative and executive control over all insular charitable institutions was vested in the Director of Charities and the Executive Council.

OFFICE OF THE ATTORNEY-GENERAL,

March 26, 1901.

SIR: I beg to return the communication of the Auditor to you dated on the 23d and endorsed by you to me on the same date, with the accompanying documents referring to the question of the relation of your department toward the Director of Charities.

Upon an examination of the act entitled, "An Act to abolish the Board of Charities of Porto Rico, to create the office of Director of Charities and for other purposes," approved January 31, 1901, I have reached the conclusion that section *G*, article 4 of General Order 102, series of 1900, has been impliedly repealed; that the control of your department over the Director of Charities ceased on March 1, 1901; that the Director of Charities is responsible to the Executive Council only, and that his reports must be made to that body. Section 1 of the act in express terms abolished the former Board of Charities created by General Orders 116 and 117, series of 1899, and which under section *G*, paragraph 4 of General Order 102 of April 30, 1900, was attached as a bureau or division to the Department of the Interior. This section also transferred the powers and duties of the old board to the Director of Charities and the Executive Council. The act goes still further: In section 2 it is provided that the "administrative and executive control" of all charitable institutions supported by insular funds "shall be vested in the Director of Charities and the Executive Council."

The "administrative and executive control" being thus

vested in the Director of Charities and the Executive Council, without qualification, no rule of construction will justify an implication that a department of government shall share in this responsibility.

The whole act indicates very clearly that it was the intention of the legislative assembly that the Director of Charities should report directly to the Executive Council. He is provided with his own disbursing officer; and section 7 plainly indicates that the rules and regulations adopted for his guidance may be prescribed by the Executive Council. In other words, I am of the opinion that the legislative assembly intended to create a new bureau which should be under the special control of the Executive Council. The General Orders referred to, and especially General Order 102, so far as they relate to the control of charitable institutions, must therefore be considered as repealed by virtue of section 15 of the act in question.

If the Auditor with respect to disbursements desires to have the Director of Charities report through you to the Executive Council, in my judgment it can only be done under a special order of the Executive Council to that effect.

Very respectfully,

JAMES S. HARLAN.

The COMMISSIONER OF THE INTERIOR.

SUPREME COURT—SUBSTITUTE JUDGES.

The organic act of the island having been enacted by the Congress of the United States must be construed according to American theories of construction and in the light of American traditions.

The practice of the Supreme Court of Porto Rico of appointing substitute judges temporarily to fill the places of its regular members when absent, sick or otherwise unable to perform their duties, though lawful in the time of Spain, has not now the authority of law.

No one not appointed by the President of the United States by and with the advice and consent of the Senate of the United States, and who has not taken an oath to support the constitution and laws of the United

States and of Porto Rico, is entitled to sit in the Supreme Court of Porto Rico and participate in its judicial acts.

OFFICE OF THE ATTORNEY-GENERAL,

April 4, 1901.

SIR: Since our talk in relation to the murder case,¹ heard before the Supreme Court on Saturday last, I have given further thought to the question of the validity under the present law of a death sentence pronounced by a majority of the judges of a trial court. And I find myself compelled to adhere to the conclusions then made known to you. There is however another point of such importance as in my judgment to make it necessary to address this communication to you.

My understanding is that under a recent order by your court Mr. Cuevillas, a member of the bar, has been appointed a substitute judge temporarily to fill the vacancy caused by the resignation of Judge Nieto. This action was taken in pursuance, I presume, of the practice under the Spanish system and under General Orders 118, section 94, series of 1899, providing for the nomination by the court of substitute judges in case of the sickness, inability or absence of any of the regular members of the court. I understand also that Mr. Cuevillas was present in that capacity at the argument of the case referred to above.

I desire to call your attention to the fact that the Foraker act, being an enactment by the Congress of the United States, will be construed, should any part of it come up for consideration before the Supreme Court of the United States, in accordance with American rules of construction and in the light of American traditions. It seems to me therefore that there is much ground for doubt as to what view that court would take of the appointment of a substitute judge should the case be appealed and a point be made of his participation in it. That practice is almost wholly unknown in the United States and would not be upheld

¹ The case in question came before the Supreme Court on appeal from the District Court of Ponce. In the latter court five men had been sentenced to death, by a majority of the court, on a charge of murder. The sentence was afterwards affirmed in the Supreme Court, and four of the condemned prisoners executed, the sentence of one of them having been commuted by the Governor to imprisonment for life.

by American courts, except where the constitutional or statutory authority for it was so clear as to admit of no doubt. The Supreme Court of Porto Rico was created by the Foraker act; its members under the provisions of that act are appointed by the President of the United States; their nomination by the President must be confirmed by the Senate of the United States; and they are required by that act to take an oath to support the Constitution of the United States and the laws of Porto Rico. Mr. Cuevillas has not taken such an oath; he has not been confirmed by the Senate of the United States; he was not appointed by the President of the United States, but by the Supreme Court of Porto Rico, acting under a general order not applicable since the passage of the Foraker act. Upon the resignation of Judge Nieto the right of the President to nominate and, with the consent of the Senate of the United States, to appoint a judge to fill that vacancy is not to be doubted. In my judgment it cannot be filled even temporarily by any one else.

What weight would be given in the consideration of the case, by the Supreme Court of the United States, to the presence in your court of a substitute judge not appointed by the President or confirmed by the Senate of the United States is a matter about which I can venture no conjecture. But in view of a late act of the legislative assembly, which provides that three members of the court shall constitute a quorum, it is certain that the decision of the four regular members—the other being absent for any cause—would stand as the judgment of the court for all purposes. And inasmuch as no decision has been announced by the court, and, as I am informed, no discussion had on the case, it would seem advisable to avoid the possibility of error by suggesting to the court that Mr. Cuevillas refrain from participating in the decision of the case; and that this be indicated in proper language on the record.

As the court has been following the prior practice of appointing substitute judges, I am reluctant to make this suggestion. I hesitate the more because Mr. Cuevillas has been invited to serve as a substitute judge, and his character and capacity as a lawyer well qualify him for such duties. Nevertheless the practice seems to me to be inconsistent with law, and for this reason I feel compelled to call the matter to the attention of the court.

Will you be kind enough to lay these suggestions before the court?²

Very respectfully yours,

JAMES S. HARLAN.

The FISCAL OF THE SUPREME COURT.

CODE COMMISSION DISBURSEMENTS.

The Code Commission, although authorized by an act of Congress, having placed itself in the attitude of a bureau of this government, is bound by the rules and regulations adopted by the government in the matter of disbursements.

OFFICE OF THE ATTORNEY-GENERAL,

April 6, 1901.

SIR: I have the honor to return herewith the communication to you of the 2d of Señor Hernandez Lopez, commissioner and disbursing officer of the committee to revise and compile the laws of Porto Rico, which on the same date you referred to me for examination.

If this matter had come before me when the commission first entered upon the performance of its duties, it is possible that I should have been compelled to differ with the Auditor of Porto Rico on the question of the expenses of that body. For it is clear that the Foraker act will bear an interpretation that would substantially take the whole question out of the control of the insular government. I have before me however a communication from the Auditor dated on April 4, in which he narrates the history of the relations between the commission and the insular government and encloses copies of letters that have passed between them and copies of orders entered upon the minute book of the commission.

It is quite apparent from these letters and from the records of the commission and from the history of the relations existing between it and the insular government, that the commission has practically placed itself in the attitude of a department bureau

² The Supreme Court, upon a full consideration of the matter, decided that there was no authority in law for the appointment of substitute judges, and the practice was thereafter abandoned.

of this government. All of its financial relations with the government have proceeded on that basis. This being so I am not disposed to go beyond the interpretation thus made by the commission itself of its rights under the Foraker act. On the contrary I feel compelled to accept that interpretation. It follows that considered as a bureau of the insular government the commission is bound by the rules and precedents heretofore adopted by the government in dealing with its officers and employees. It is not necessary for me to go into the statement by the disbursing officer of the commission that sections 1763 and 1765, Revised Statutes of the United States, are mere departmental rules intended to govern the departments at Washington only. The insular government having adopted the substance of these statutes as a rule of action in its own departments, I am unwilling to hold that in the matter of the expenses of the code commission any other rules should apply.

Very respectfully,

JAMES S. HARLAN.

The ACTING GOVERNOR.

INCOMPATIBILITY OF OFFICE.

Until the 1st day of December, 1902, a member of the house of delegates may hold any other public office, even though compensated in the form of a salary or otherwise.

OFFICE OF THE ATTORNEY-GENERAL,

April 16, 1901.

SIR: I beg to return herewith, with my approval for payment, requisition No. 20 of this department, for the amount due to Hon. Manuel F. Rossy, for services rendered by him as substitute to Judge Cuchi in the District Court of San Juan.

In this connection I call your attention to the act entitled "An act declaring the office of delegate to be incompatible with other public offices," approved January 17, 1901. As you will observe, section 4 of this act provides that it shall take effect from and after the 1st day of December, 1902. Under the terms of the act it is clear that after that date a member of the house of delegates is prohibited from holding any other

public office to which compensation is attached, whether the compensation is paid out of municipal, insular or federal funds. It is also clear that this act must be taken as an affirmative expression by the legislative assembly of Porto Rico to the effect that until the date mentioned a member of the house of delegates may hold any public office and receive a salary or other form of compensation for the performance of the duties thus devolving upon him. And as such an expression it is paramount in authority to any rule in respect to such matters that may be in force in any of the departments.

For these reasons I am of the opinion that the amount due to Mr. Rossy as shown upon this requisition should be paid.

Respectfully yours,

JAMES S. HARLAN.

The AUDITOR.

BOYS' CHARITY SCHOOL.

The district courts under the penal code may still order the commitment of boys over nine years of age and under fifteen to confinement in charitable institutions. But the Director of Charities cannot be compelled to accept such a boy in the boys' school of charities, unless the case meets the requirements of the rules prescribed by him and approved by the Executive Council.

OFFICE OF THE ATTORNEY-GENERAL,

April 22, 1901.

SIR: I return herewith the letter of the Director of Charities of the 15th, endorsed to me for an examination of the question of the power of the courts to order the commitment of boys to the Boys' Charity School.

In section 2, article 8, of chapter 2 of the penal code it is provided that a person under nine years of age shall be exempt from criminal responsibility. In section 3 of the same article the exemption is carried to persons over nine years of age and under fifteen years of age, when such persons are so immature that they act irresponsibly or without the exercise of judgment. In such cases the same section provides that, in the absence of some one to care for and educate him, such a person "shall be taken to a charitable institution for the education of orphans

and foundlings, and he shall not leave such institution except at the time and under the conditions prescribed for its inmates." This seems to be the only provision in the Spanish law relating to the subject matter of the inquiry of the Director of Charities.

As to the charitable institutions of the present insular government for the education of orphans and foundlings, the law referred to is not now in force. Section 4 of the act entitled "An act to abolish the Board of Charities of Porto Rico, to create the office of Director of Charities and for other purposes," approved January 31, 1901, expressly vests in the Director of Charities the power, subject to approval by the Executive Council, to prescribe the conditions of admission to and dismissal from the public insular charitable institutions, and to make all needful rules and regulations concerning such institutions and the government thereof. I am of the opinion therefore that while the judges of the courts, so far as the person before them is concerned, may still exercise the power of commitment referred to in the penal code, they nevertheless cannot compel the Director of Charities to accept such a person unless the conditions of admission and dismissal prescribed by him and approved by the Executive Council so require. In other words, the whole matter rests in the discretion of the Director of Charities, so far as such conditions as he may have prescribed have met with the approval of the Executive Council. The rules already prescribed by the Director of Charities and approved by the Executive Council do not contain any such provision.

Very respectfully,

JAMES S. HARLAN.

The ACTING GOVERNOR.

ILLEGALITY OF COCK-FIGHTING.

Article 14 of the military order, entitled "Regulations of the Society for the Prevention of Cruelty to Animals," is in force as a police regulation, and therefore repeals all Spanish regulations governing cock-fighting, and makes it now unlawful.

OFFICE OF THE ATTORNEY-GENERAL,

April 23, 1901.

SIR: I beg to acknowledge the receipt of your letter requesting an opinion as to the legality of cock-fighting and enclosing a letter from the chief of the insular police in relation to the same matter.

On May 16, 1899, the military governor issued an order entitled "Regulations of the Society for the Prevention of Cruelty to Animals." Article 14 of this order is as follows:

Cock fights are likewise absolutely forbidden, whether in public places or rings or in private premises. Violators of this provision if owner or owners of the public or private building where the fight takes place shall be fined one hundred (100) pesos; each person present five (5) pesos, and each of the coleadores (those who direct the fight) twenty-five (25) pesos. A repetition of the offense shall be punished with double fine and imprisonment of from one to five days.

The penal code in force before the American occupation of this island contained no provision forbidding cock-fighting. It is also true, as stated by the chief of insular police, that the article in question is found in the regulations of a society. But it cannot be doubted that that order like other general orders of the same character has the force of the law. Nor can it be doubted that the article in question was intended and must now be considered as a general police regulation, to be enforced as other laws of a similar character are enforced. It is not unusual in the United States to find in the laws relating to societies for the prevention of cruelty to animals similar police regulations, under the authority of which arrests are made by police officers and punishments inflicted in the police courts. That the article must now be taken as a part of the general police regulations of the island becomes more manifest from the terms of the act of the late legislature entitled "An act restricting and limiting the authority of the Society for the Prevention of Cruelty to

Animals," etc., approved January 31, 1901. This act withdraws from the society the power theretofore enjoyed by it concurrently with the courts of imposing and collecting fines for infractions of the terms of the general order in question, and leaves the sole jurisdiction in the courts of the island.

The general order in question repeals the Spanish regulations governing cock-fighting, and it is the duty of the insular and municipal police and of all other authorities, including the several courts, not only to take the steps necessary to prevent cock-fighting, but to enforce punishment upon all who may violate article 14 of the general order in question.

Very respectfully,

JAMES S. HARLAN.

The ACTING GOVERNOR.

ELECTION OF MUNICIPAL JUDGE.

A law involving the forfeiture of an honorable office must receive a strict interpretation, and therefore an election as judge of the municipal court of the San Francisco District of San Juan, heretofore disapproved by the Attorney-General, is now approved.

OFFICE OF THE ATTORNEY-GENERAL,

April 24, 1901.

SIR: Just before my departure on a journey across the island there was handed to me a communication upholding the legality of the election of Mr. José Bazan as municipal judge of the San Francisco District of San Juan, prepared, as I am informed, by an eminent lawyer, whose opinion on legal matters is highly respected throughout the island, and whose conclusions on matters relating to Spanish laws as heretofore and now existing in this island I am always glad to listen to with respect. Since my return I have received your courteous communication of the 17th in which you embody a copy of a resolution passed by the town council of San Juan on the 15th, together with the opinion touching the same matter pronounced by Mr. Cañellas in his capacity as counsel for the municipal corporation.

When the election of Mr. Bazan was first called to my

attention and I had taken an opportunity to examine the law, I reached the conclusion that, inasmuch as the law in express terms required the suspension of a judge whenever *after* his election he engaged in any business that was incompatible with the performance of judicial functions, it would of necessity follow from the spirit of the law that the election to judicial office of one then actually engaged in such business must be null and void. If the existence of a fact *after* his election would require his suspension, the existence of the same fact *before* and *at the time* of his election seemed to me, according to the spirit of the law, to disqualify him from being elected at all. For obviously an election which under the law would require an immediate suspension of the incumbent, could not have been in the contemplation of the legislature.

I have however re-examined this matter, and, as a law involving the forfeiture of an honorable office ought to be interpreted more in accordance with its exact terms than in accordance with its spirit, I have reached the conclusion that the resolution heretofore announced by me is not in accordance with a technical construction of it. I therefore withdraw the notice heretofore given to you that a vacancy exists in the office of municipal judge of the district above mentioned, and I hereby ratify the election of Mr. Bazan to that office.

Very respectfully,

JAMES S. HARLAN.

The ALOALDE OF SAN JUAN.

BONDS OF NOTARIES.

The bond of an American surety company does not comply with article 14 of the notarial law, and therefore cannot be accepted as qualifying the applicant for practicing as a notary.

OFFICE OF THE ATTORNEY-GENERAL,

April 24, 1901.

SIR: I have examined article 14 of the notarial law, now in force in Porto Rico by virtue of a decree promulgated on October 29, 1873, by the President of the government of the republic, and I venture to make some suggestions for your consideration in relation to its construction.

Upon an investigation of the matter I find that it has been the custom heretofore not to accept any bonds in the nature of surety bonds from those desiring to qualify themselves for practicing as notaries. And this custom seems to me to be in exact conformity with the requirements of the law as expressed in article 14. While the language of that article, "*dicha fianzu podra consistir,*" may to some extent be permissive in character, its substance is nevertheless distinctly limited to certain definite classes of guaranties. The provision is that the guaranty may consist, (1) of a deposit in coin; (2) of bonds of the public debt; (3) of agricultural or town property mortgaged for the purpose; "*fianzas que habran de producir una renta anual.*" These classes of guaranties being distinctly named in the article in question, it seems necessary to conclude that the law intends the exclusion of all others. And this, as I am informed, has been the construction heretofore placed upon it. The rule of construction applicable in such matters is well stated in the maxim, *expressio unius est exclusio alterius*.

The securities mentioned in the article in question are such as have a market value and can readily be disposed of by sale. They are therefore immediately available in case just demands accrue against them. On the other hand bonds issued by the several American surety companies have no market value; they cannot be sold in open market; they do not produce an annual interest as required in the notarial law. They are simply in the nature of a contract of indemnity upon which suit would have to be brought before the contract could be enforced. They are in form nothing more or less than personal surety bonds, and to accept them, in my judgment, would offend the terms of the law. I do not see how this can be done without the consent of the legislative assembly, which alone is vested with the authority to declare new policies and to enact laws to carry them out.

I shall at your convenience be glad to talk with you further in connection with this matter and to make a further examination of the law if the conclusions here stated do not conform to your views.

Very respectfully,

JAMES S. HARLAN.

The CHIEF JUSTICE.

FREEDOM OF RELIGION.

Religion and religious ceremonies are free from governmental interference.

OFFICE OF THE ATTORNEY-GENERAL,

April 26, 1901.

SIR: Your communication of the 25th is before me, and I have read what you have to say with some surprise.

You complain that a Roman Catholic religious procession took place in Ponce with my sanction. This is true. But I beg you to suggest what action you yourself would have taken had you been the incumbent of this office. It will interest me to have your reply to this question. But in making a reply it will be well for you to remember that, although, as you state, under our constitution and traditions, there is no established church in the United States, on the other hand, the practice of religion and religious ceremonies in all of their phases is absolutely free from governmental interference, except where they offend the general code of public morals. This being so, I should like you to suggest upon what theory consistent with our history and traditions I could have refused permission for the procession in question. It is not often that I am willing to enter into such a correspondence as this. While, like yourself, I am a Protestant, I do not forget that I am sent here to administer the law, and I could no more refuse consent to a religious procession conducted peaceably in the streets of Ponce by that religious denomination than I could refuse consent to public preaching in the church over which you preside.

Respectfully yours,

JAMES S. HARLAN.

A PROTESTANT MISSIONARY.

JURISDICTION OF ALCALDES AS MAGISTRATES.

The purpose of the act entitled "An act to provide for the organization of police courts in the island of Porto Rico," approved January 31, 1901, was to withdraw from the alcaldes all duties as police magistrates. Although that act expressly refers to General Orders 195, series of 1899, and omits any reference to General Orders 128, of the same series, the presumption will not be indulged that the intention of the legislature was to leave the execution of the latter to the alcaldes. These officials have now no judicial machinery with which they may constitute and operate a court of justice, and therefore by fair implication their jurisdiction under General Orders 128 was withdrawn from them by the act creating police court tribunals and vested in the latter officials.

OFFICE OF THE ATTORNEY-GENERAL,

May 23, 1901.

SIR: I return herewith the communication addressed to you on May 1, by the alcalde of Vega Alta and endorsed by you to this office on May 13 for my opinion on the question contained therein. That question is whether the alcaldes of the several municipalities are the proper authorities to enforce General Orders 128, series of 1899, or whether that order is to be enforced by the police magistrates.

It is apparent that the purpose of General Orders 195, series of 1899, was not only to create a police tribunal for each municipality, but to define the general jurisdiction of these tribunals over the petty offenses usually cognizable in police courts. There is nothing however in that order indicating the intention of the authority then legislating for the island to repeal General Orders 128. It is clear therefore that the last-named order still has the force of law. But is it still to be enforced by the alcaldes? Or shall the new police magistrates enforce the penalties prescribed for the breach of its provisions?

It is a part of the history of recent discussion and legislation in Porto Rico that the performance of judicial functions by the alcaldes had given rise to some adverse criticism. And the act entitled "An act to provide for the organization of police courts in the island of Porto Rico," approved January 31, 1901, seems to me (although it in terms refers only to General Orders 195 and omits any reference to General Orders 128) an expression on the part of the legislative assembly of the intention to with-

draw from the alcaldes all police court duties and to vest those functions in a new set of police magistrates not elected by the people of the respective municipalities or subject to local political influences, but appointed by the Governor of Porto Rico and responsible to him only for the impartial performance of their duties.

This being its purpose, certainly no presumption will be indulged that the legislature intended to leave to the alcaldes a remnant of their former judicial functions. There is now no judicial machinery with which they may constitute and operate a court of justice. And therefore, notwithstanding the fact that the act refers in terms only to General Orders 195, the only reasonable conclusion that can be drawn from it is that the legislature intended the enforcement of police regulations in their entirety to be vested in the new police tribunals. And the jurisdiction in the matter of stray animals, formerly vested in alcaldes under General Orders 128, being a part of the general police regulations, by fair implication was withdrawn from them by the act in question and vested in the new courts. Of course, if General Orders 128 were of a criminal nature rather than a mere matter of police regulation, a more strict and literal construction of the powers conferred by the police court act would be required. But such is not the case.

Very respectfully,

JAMES S. HARLAN.

The ASSISTANT SECRETARY.

AUTHENTICATION OF LETTERS ROGATORY.

The Spanish government having agreed not to require the authentication of the signatures of the officials of the United States intervening in the execution of letters rogatory from Spain, and having requested that the authentication of the signatures of Spanish officials executing similar commissions from the United States may be dispensed with, *Held*, that it is competent for the Attorney-General to issue instructions to the respective courts of the island providing that the formal legalization of letters rogatory received from Spain through diplomatic channels may be omitted.

OFFICE OF THE ATTORNEY-GENERAL,

May 24, 1901.

SIR: I return herewith the communication and the accom-

panying memorandum addressed to the Governor of Porto Rico on April 23, by the Secretary of State at Washington, and referred to me for consideration by your office on the 13th.

The memorandum states that the Spanish government does not require the authentication of the signatures of United States authorities intervening in the execution of letters rogatory from Spain, and that that government is anxious that the authentication of the signatures of Spanish officials to commissions of a similar nature proceeding from the United States shall not in the future be required.

So far as the government of Porto Rico is concerned in this request of the Spanish government, I see no reason why it cannot be acceded to. This government has heretofore required the signatures of Spanish officials executing its letters rogatory to be authenticated only for the purpose of lending greater authority to such documents as evidence, and of proving the authenticity of the signatures of the officials executing them. But as the transmission of such documents through diplomatic channels is of itself a sufficient guarantee of the authenticity of these signatures I am of the opinion that as a matter of proper judicial procedure the formal legalization of letters rogatory received from Spain through diplomatic channels may be omitted. I am also of the opinion that the government of Porto Rico through this department may order the insular courts to proceed in this matter in accordance with the request. If therefore it is your pleasure to reach such an understanding with the Spanish government and you will advise me of the action taken by you I shall forthwith issue the necessary instructions to the respective courts of the island.

It will of course be understood that this arrangement shall apply only to letters rogatory and not to other documents coming from Spain, such as letters of attorney, which may by law require attestation or other certificate showing the authority and authenticity of the signatures of the officials intervening therein.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

EXEMPTION FROM TAXATION—INSURANCE CREDIT.

A wharf upon which the owners claim a legal exemption from taxation having been totally destroyed by fire, *Held* that under the law authorizing a tax on credits the exemption must in equity be held to attach to the credit arising from the fire insurance policies covering the property, whether such credit is payable to the owners in the island or elsewhere.

OFFICE OF THE ATTORNEY-GENERAL,

June 10, 1901.

SIR: I have examined and herewith return the papers filed with the board of appeal in connection with the appeal of the New York & Porto Rico Steamship Company against the assessment for taxes levied against it by the board of review.

I am of the opinion that the insular government is without power to levy a tax upon the wharf in question or upon its value in the form of an insurance credit after its destruction by fire. The revocable license under which the wharf was built especially provides that it shall be free from taxation. In my judgment even if the insurance money accruing upon its destruction by fire from the insurance companies was payable here, an equitable view of the matter would require the exemption from taxation to attach to that fund. The undoubted purpose of giving this exemption to the company in the first instance was to secure a wharf at San Juan or at least to foster the business of the company after the erection of the wharf. This intention would not be fulfilled in my judgment if after the company had put its capital at hazard by the erection of the wharf it should be subjected to taxation upon the wharf after it has been changed by its destruction by fire into the form of an insurance credit. In addition there is the further suggestion that the insurance money is not payable here and that it will be paid to the company at its main office. While no proof of this statement is before me, it is entirely probable that the adjustment of the difference between the petitioner and the insurance companies will be effected at its home office. This being so the credit is not one that can be fairly considered as coming within the taxing powers of this government.

I observe by the papers that some other questions are in-

volved in this appeal but as they have not been specially referred to me, I have not considered them.

Very respectfully,

JAMES S. HARLAN.

The TREASURER.

THE GOVERNOR'S POWER TO SUSPEND AND REMOVE ALCALDES.

The Governor for good cause may remove alcaldes, but complaints against them should first be laid before the Executive Council.

The Executive Council has succeeded to some of the functions of the council of administration, and by fair implication it is the Governor's duty before removing an alcalde to lay the matter before the Executive Council.

OFFICE OF THE ATTORNEY-GENERAL,

June 11, 1901.

SIR: I have the honor to return herewith the letter of the Assistant Secretary to you, dated on June 7, relating to the power of the Governor to suspend and remove alcaldes and members of municipal councils.

As to the power to suspend alcaldes for good cause there can be no question. This power remains in the Governor and may be exercised by him in his discretion. I concur also in the conclusion reached by the Assistant Secretary that the Governor is vested with the power of removing alcaldes. But I am of the opinion that such action must be preceded by a reference of the matter to the Executive Council.

The provision of article 52 of the municipal law is as follows:

The Governor General may also remove alcaldes when he considers there is good cause therefor, hearing the council of administration.

The intention of this provision seems to be not so much to require the concurrence of the council of administration in the removal of an alcalde by the Governor, as to add formality to his action and induce conservatism in the use by him of the power.

The Assistant Secretary seems to be of the opinion that the council of administration has been abolished. I have not been able to find any legislative or administrative action by which

that body was dissolved. Possibly he has reached that conclusion because of the change of sovereignty and upon the general theory that the creation of a new government for the island has had that effect. Without entering however into a discussion of this question, it is clear that the Executive Council has succeeded to some of the functions of the council of administration. The functions of the two bodies are to some extent similar, for the council of administration was the upper house of the parliament of Porto Rico, and was also to some extent administrative in character. Its duties are defined in the laws relating to civil administration in government in chapter 2 of the title "The Council of Administration." And with respect to the exercise of the power of removal I am of the opinion that inasmuch as the law requires the Governor to lay his action before the council of administration, by fair implication and in view of the fact that the concurrence of that body is not required, this duty of now hearing and considering the action of the Governor in such cases devolves upon the Executive Council.

I have the honor, sir, to be your obedient servant,
JAMES S. HARLAN.

The GOVERNOR.

SCHOOL DIRECTOR—EFFECT OF CHANGE OF DOMICIL.

Residence is a matter of intention and a legal domicil may be acquired immediately upon establishing a home with the intention of making it a legal domicil.

A school director, although still a qualified voter in municipality A, may under the law lose his right to continue as such director by establishing his domicil in another district.

OFFICE OF THE ATTORNEY-GENERAL,
July 1, 1901.

SIR: I beg to acknowledge the receipt of your communication of June 28, inviting my attention to section 8 of the school laws of Porto Rico, and asking a construction of that part of the section that reads as follows:

Vacancies in school boards caused by death, resignation, removal from district or failure to attend stated or called meetings for two months shall be filled by appointment of the district court.

You state the case of a school director in municipality A, who, although he has actually removed his family to municipality B, and has established a domicile there for them, yet claims that so long as he attends school board meetings in municipality A with regularity he is qualified to act as a school director on that board.

Upon these facts you ask me to inform you "what constitutes a legal residence and when a legal residence is forfeited."

In answer to this inquiry I beg to say that, generally speaking, the matter of residence is one of intention. Wherever a man has fixed his domicile or habitation, his permanent home and principal domestic establishment (as distinguished from his temporary place of abode), to which, when business or pleasure calls him away, he intends to return, there in law he has his residence and of that municipality or district, as the case may be, he is a resident. A legal domicile may be acquired in the passing of time or immediately, by establishing one's family in a home with the intention of making it the legal domicile. But there must be an *animus manendi*. Bouvier's Law Dict. and authorities cited. See also Political Code of Porto Rico, Section 11, Pars. 1 and 7.

Applying this general rule to the case stated, I am of the opinion that the gentleman in question is no longer qualified to act on the school board of municipality A. And in support of this conclusion I invite your attention to the fact that, although in section 2 it is provided that members of the school board shall be qualified voters, section 8, in which the phrase "removal from district" is used, plainly indicates that the intention of the legislature was not only that a school director shall be a qualified voter, but that he shall remain in the district. In the case stated by you the director, although claiming to be a qualified voter in municipality A, and although he may regularly attend the meetings of the school board in that district, must nevertheless remain in that district as his place of domicile in order to continue legally to serve as a school director there.

This conclusion is reinforced by the terms of the act of the legislative assembly entitled, "An act concerning resignations and vacancies," approved January 25, 1901. In section 2 of this act it is provided that an office becomes vacant on the happening of certain events, and one of these events, as set forth in paragraph 5 of that section, is as follows:

24 *Foreign Corporations doing Business within Porto Rico.*

5. His ceasing to be a *resident* of the island, or if the office be local, of the district, city, county or town for which he was chosen or appointed or within which the duties of his office are required to be discharged.

With these provisions before us there can be no doubt that the school director in question by removing his family to another district, where he has established his domicil, has ceased to be qualified to act longer as a school director in the first district. The presumption will be indulged until the contrary is shown that he has established a new domicil. It may be true, under the special provisions of the election law, that he is qualified to vote in the first district until in the progress of time he has established his right to vote in the new district. But he has ceased to be a *resident* of the former district, and this alone, under the law, without regard to his capacity to vote, disqualifies him for holding office longer in the first district as a school director.

Respectfully yours,

JAMES S. HARLAN.

The COMMISSIONER OF EDUCATION.

FOREIGN CORPORATIONS DOING BUSINESS WITHIN PORTO RICO.

The transporting of freight and passengers from port to port in the island of Porto Rico is commerce of a local nature, and in no sense may be said to be commerce "with foreign nations and among the several states."

As the New York & Porto Rico Steamship Company is engaged in commerce from port to port in the island, it is therefore doing business here, and must comply with paragraph 2, section 63, of the revenue law, approved January 31, 1901, and with the act regarding foreign corporations approved on the same date.

The fact that the principal business of that company is to transport passengers and freight between Porto Rico and New York and that the local business is incidental only, does not relieve the company from complying with the local law. If to any extent it carries on business of a local character, to that extent it is doing business in the island within the meaning of the statutes in question.

OFFICE OF THE ATTORNEY-GENERAL,

July 1, 1901.

SIR: On the 17th of April last Messrs. Curtis, Mallet-Prevost

& Colt addressed to me a communication on behalf of your company enclosing a brief memorandum of the legal points involved in the question whether your company must comply with the requirements of paragraph 2, section 63, of the revenue law of Porto Rico approved January 31, 1901, and with the provisions of the act regarding foreign corporations approved January 31, 1901. The former law requires a foreign corporation to obtain a license before doing business in Porto Rico; the latter requires a foreign corporation to file certain statements and certificates before doing business in Porto Rico. And the proposition was advanced that the provisions above referred to do not apply to your company, for the reason that it is engaged in foreign or interstate commerce, and that any law requiring a license or imposing any condition upon the right of your company to do such business is repugnant to the Constitution of the United States. I was requested to examine this question and to communicate my conclusions to you as the agent of the company, and was advised that upon receiving my opinion you would at once comply with the requirements of law in case I should deem such action necessary. An examination of the question, and of others of a similar nature, has been delayed in order to have the benefit of the opinions of the Supreme Court of the United States in the insular cases so far as they might be pertinent.

The memorandum of authorities cited by your solicitors has been read with interest. But I have been compelled to reach the conclusion that your company comes within the terms of the two statutes above mentioned; that neither statute, so far as it relates to your company, is repugnant to the Constitution of the United States; and that in order to qualify itself for lawfully carrying on the business which it is now doing in this island the company must secure a formal license from the Treasurer of Porto Rico, and must file with the Secretary the statements required by law.

In support of this conclusion I desire to remind you of the fact, which doubtless will not be controverted, that your principal is engaged in a business of a twofold nature; first, in transporting merchandise and passengers from ports of the United States to ports of the island of Porto Rico; second, in transporting both freight and passengers from port to port in

this island. This is a matter of common knowledge and for the purposes of this communication will be assumed as a fact. With respect to business of the latter character your company therefore stands exactly in the position of any foreign corporation that opens an office here and transacts business in the island of a local nature. Business done from port to port in the island is of a local nature, and in my judgment cannot in any sense be said to partake of the character of commerce "with foreign nations and among the several states." It is true that such business is but incidental to your general business, and consists in transporting merchandise and passengers from port to port while your steamships are on their way around the island gathering passengers and merchandise for transportation to New York. But it is not a proper test of the question to say that the principal business of the company is of the character of foreign or interstate commerce. If the company to any extent carries on business of a local character, to that extent it is doing business in the island of Porto Rico within the meaning of the statutes in question. For that reason the statutes referred to do not seem to be void under the Constitution of the United States nor their requirements a regulation of foreign or interstate commerce. I am therefore of the opinion that in order to lawfully continue such business your company must at once qualify under the laws of Porto Rico in the manner pointed out in its statutes.

Very respectfully,

JAMES S. HARLAN.

BENJAMIN F. BUTLER, Esquire,

Manager New York & Porto Rico Steamship Company.

BOUNDARY DISPUTE BETWEEN TAXING DISTRICTS OF LOIZA
AND RIO GRANDE.

The act entitled, "An act to establish the boundary line for the taxation of the districts of Loiza and Rio Grande," approved January 31, 1901, is construed in the light of the facts that induced its enactment.

The act having been passed in order to provide a means of adjusting a dispute as to a portion of the boundary line, the Commissioner of the Interior was not authorized to readjust the entire boundary line, but only the portion in dispute.

The Commissioner having acted before being fully advised of the facts may revoke his action or limit its effect to the portion of the line in controversy.

OFFICE OF THE ATTORNEY-GENERAL,

July 6, 1901.

SIR: The act of the legislative assembly of Porto Rico entitled, "An act to establish the boundary line for taxation of the districts of Loiza and Rio Grande," approved January 31, 1901, to which you call my attention in your communication of the 3d, does not have the character of a general law, but comes under the head of special legislation. In construing it we are not confined absolutely, as it seems to me, to the terms of the law itself, but may resort for information to the facts that induced its enactment. *Blake v. National Bank*, 23 Wall. 307; *The Delaware*, 161 U. S. at p. 472.

The facts as stated in your letter are as follows: Between the districts of Loiza and Rio Grande a dispute as to the boundary line has been pending for some time. The territory involved was limited to a certain estate known as "Quebrada Lajas," all other portions of the boundary line between the two districts having been settled some time before, either by law or by the long acquiescence of the authorities and the general public of both districts.

The act in question is remedial in character, and was passed in order to provide a method of adjusting a dispute which the parties had been unable to adjust among themselves. That being the purpose of the act, it is clear that the power of the Commissioner of the Interior was limited to the subject matter of the dispute, and the exercise of power by him beyond the limits of the dispute was not authorized. I am of the opinion therefore that it is proper for the Commissioner of the Interior to notify the Treasurer of Porto Rico and the executive officers of the two districts concerned that he, not having been fully advised by them of the extent of the controversy between the two districts, has fixed a boundary line that goes beyond the matter in dispute and interferes with and disturbs the ancient boundary line; that his power under the act in question did not permit of a readjustment by him of the whole boundary line, but only of a settlement of the portion remaining unadjusted, that he therefore now revokes his order of April 15, so far as it pur-

ports to establish a boundary line between the two districts outside of the limits of the estate known as "Quebrada Lajas;" and that as to the boundary line within the limits of that estate, his order of April 15 will stand.

Very respectfully,

JAMES S. HARLAN.

The COMMISSIONER OF THE INTERIOR.

FREEDOM OF THE PRESS.

Article 10 of the printing law requiring the publisher of a newspaper in the act of its publication to present to the Governor and the alcalde three copies, authenticated by his signature, and the requirement that one copy shall be stamped and returned to the publisher, were designed to secure to the government a supervision and control over the press that is hostile to its freedom and is inconsistent with the political character and institutions of the insular government. Being a law of a political nature it ceased to be in force upon the inauguration of an American government in the island.

OFFICE OF THE ATTORNEY-GENERAL,

July 17, 1901.

SIR: I have the honor to acknowledge the receipt of a communication recently addressed to you by the alcalde of San Juan, and endorsed by you to me for consideration, stating that the publishers of newspapers at the capital do not send to the alcaldia the number of copies of their papers specified in article 10 of the printing law. That article reads as follows:

Article 10. The director of any newspaper must present *in the act of its publication*, three copies of each number and edition *authenticated by his signature*, to the government of the province, to the special administrative delegate, or to the mayor's office at the place where the paper is published. Of the newspapers of Havana and of those of San Juan Bautista de Puerto Rico, three additional copies shall besides be presented with the same formalities to the general governments of the islands of Cuba or Porto Rico respectively. *One of the said copies shall be stamped and returned to the person by whom they have been presented.*

In section 34 of the same law the failure to comply with the requirements of article 10 is punishable administratively; that is to say, the mayor or the Governor, under the terms of

article 34, may impose fines without the intervention of any court.

I am informed by high authority that since the promulgation of this law in 1886 the censorship over the public press, which was theretofore practised in this island by the Spanish government, has in reality not been enforced. And it is said by some that under article 10 of that law a censorship was not intended.

What then can be the meaning of the article? It cannot in any sense be said to be a license tax for the privilege of publishing a newspaper. Such a tax could be paid as well in money as in papers; and if in papers, as well *after* as in the *act* of publication. Moreover the provision that one of the papers shall be stamped and returned to the publisher is not consistent with the theory of a tax, which customarily involves payment only and not a return of part of what has been paid.

It is suggested however that the law is merely a method which the Spanish government reserved to itself of obtaining knowledge of all that was published, and of having the evidence at hand in case any article was of such character as to furnish occasion for criminal punishment. If this was its purpose it may be said in passing that the government could acquire information in the one case and the evidence in the other by purchasing copies, instead of depriving the publishers of their property without compensation. It must be borne in mind also that if the government can take three copies for that purpose, it may take any number of copies on the same principle. And such a taking of property without just compensation is not consistent with republican institutions.

But however leniently article 10 may have been enforced by the Spanish government when in control of this island, and whatever may have been the practice under it, a careful consideration of the language of the article must lead to the conclusion that it was designed to secure to the government a certain administrative supervision and control over the publication of newspapers. Any other purpose would have been satisfied by the delivery of the three copies *after* publication, instead of "*in the act of publication.*" It is difficult moreover to explain the provision requiring the publisher to authenticate the three copies by his signature, unless it was intended not only to attach personal responsibility to him for the contents of the publication, but

also to furnish the government at once by his own signature with the evidence of this responsibility.

Finally, the provision that one of the copies thus delivered shall be stamped and returned to the publisher is an admirable method to enable a government that rules with a strong hand to intimate to the publisher, by the return of a copy thus stamped, that its contents are satisfactory, and by omitting to return a copy thus stamped that its contents are not satisfactory.

None of the requirements of this law would be tolerated by any legislature in the United States or in any other country where the freedom of the press is esteemed as one of the elements and best expressions of liberty. This freedom was in fact deemed of such importance by the people of the United States that it was made the subject of the first amendment to the constitution. That amendment provides :

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

And it was ratified unanimously by all of the states, Virginia, the last state, concurring therein on December 15, 1791.

Freedom of the press, when it has not degenerated into mere license, and when restrained, as it must and ought to be, not by executive control, but by strict criminal as well as civil responsibility in the courts for its abuse, is not less important here than it was then and is now in the United States, and any law abridging this freedom is no less repugnant to the principles upon which the government of Porto Rico is organized than it is to the principles and traditions underlying the government of the United States.

While there is not in the organic act any bill of rights or specific constitutional restraint upon the general legislative powers that belong to sovereign governments, or in the body of our existing laws any general order or legislative enactment under which article 10 may be said to have been repealed, nevertheless there is high authority in law for the proposition that the article in question must be held to have been annulled by the installation in this island of the present form of government. It is a general rule of public law that whenever political jurisdiction over any territory is transferred from one sovereign to

another the municipal laws of that territory, which tend to protect and are designed to secure the peaceful use and enjoyment of private, as distinguished from public, rights, are continued in force until changed by the new sovereign. Laws affecting the possession, use and transfer of property, and laws tending to secure good order and peace in the community and to promote its health and prosperity, are good examples of such laws. But, on the other hand, all laws, ordinances and regulations which are in conflict with the political character and institutions of the new government, such as laws in support of an established religion, or abridging the freedom of the press, or authorizing cruel or unusual punishments and the like, are at once displaced and cease to be obligatory without any legislative declaration to that effect. *Railroad Co. v. McGlinn*, 114 U. S. at p. 546.

Indeed Mr. Justice Brown, in *Downes v. Bidwell*, 182 U. S. 244, one of the cases recently decided by the Supreme Court of the United States which has been of special interest to the people of Porto Rico, having reference to certain rights which may be termed natural as distinguished from artificial rights, says at p. 282:

Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence.

Article 10 of the printing law, as I understand its real meaning, however it may have been enforced by the Spanish government, was not intended as an exercise of the police power as that phrase is understood in American jurisprudence, but was intended as an abridgment of one of these natural rights enjoyed by free people, and as such it is inconsistent with the political character and institutions of the insular government. For these reasons I am constrained to hold that it is no longer in force in this island.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

REGISTRATION OF TRADE-MARKS.

The organic act of Porto Rico delegates general legislative powers to the legislative assembly. It is therefore competent for the government to legislate in respect to trade-marks and the law of trade-marks promulgated by royal decree on August 21, 1884, is still in force.

OFFICE OF THE ATTORNEY-GENERAL,

July 17, 1901.

SIR: In connection with the application made to you for the registration of a trade-mark, which is herewith returned, you have requested an opinion as to whether such power is lodged in the Secretary's office.

In reply I call your attention especially to the cases of *United States v. Emil Steffens*, *United States v. Adolph Witteman*, and *United States v. W. W. Johnson*, decided by the Supreme Court of the United States on November 17, 1879. These cases were consolidated and heard together, and are commonly known as the "Trade-mark Cases." The opinion of the court is reported in 10 Otto, 82. It is the leading case on the question, and the doctrines then announced have not been subsequently modified.

From a statement of the facts in the case it appears that Congress in 1870 passed an act providing for the registration in the patent office of any device in the nature of a trade-mark to which any person had by usage established an exclusive right or which the person so registering intended to appropriate to his exclusive use. This act made it wrongful for any other person to use a trade-mark so registered and rendered such person liable to a civil action for damages. Subsequently in 1876 another act was passed attaching criminal responsibility to the wrongful use of a registered trade-mark. The "Trade-mark Cases" were of a criminal nature, having been based upon indictments against the persons in question.

On the part of the United States an endeavor was made to uphold this legislation on the theory that it came fairly within the powers of Congress as enumerated in clause 8 of section 8 of article 1 of the Constitution, which authorizes Congress—
to promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The court says in respect of this contention :

Any attempt however to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties.

Proceeding with its opinion the court further says that an ordinary trade-mark has no necessary relation to invention or discovery ; that the trade-mark recognized by common law is generally the growth of a considerable period of use rather than of sudden invention ; that it is often the result of accident rather than design. The court points out very clearly that, commonly speaking, the exclusive right to a trade-mark grows out of the use of it and not out of its mere invention or discovery ; and that the right is founded on priority of appropriation.

It was also contended that the legislation could be upheld under the third clause of the same section, which gives Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes. But upon a consideration of this suggestion the court was unable to find in the act anything but a broad provision for a universal system of trade-mark registration without regard to any distinction between their use either in domestic or in foreign commerce.

Without pursuing an analysis of the opinion further, it will be sufficient to observe that the two acts in question were held to be unconstitutional ; that the system of trade-mark property and the civil remedies for its protection were not created by the legislation of Congress, but existed long prior thereto ; that these property rights rest upon the laws of the several states in the same manner that other property rights do, and that they depend for their security and protection, like other property rights, upon state laws. It thus appears very clearly that trade-marks and property rights under trade-marks may be the subject of state legislation. In other words it is not a question confided exclusively by the constitution to the central government.

This being the legal status of such property rights in the United States, the question that now remains is whether trade-marks may lawfully be the subject of legislation by the legislative assembly of Porto Rico ; and whether, if they remain still

unrepealed, the legal provisions relating to trade-marks enacted for this island by the Spanish authorities still have the force of law.

As the organic act confers without limitations general legislative powers as broad as those of a sovereign government, I am of the opinion that it is competent for the insular government, just as it is for a state government, to legislate in respect to trade-marks.¹ It follows therefore that the law of trade-marks promulgated by royal decree on August 21, 1884, which has not subsequently been repealed or modified, is still in force in this island. The function of registering trade-marks as provided in that law was recognized by the United States military authorities in General Orders Nos. 15 and 112 of 1899 and No. 102 of 1900. It is therefore one of our administrative duties to consider applications for the registration of trade-marks. The only question of doubt in my mind is as to where the duty is lodged.

In that portion of the act which defines the duties of the Secretary of Porto Rico no mention is made of the registration of trade-marks, although he is required to issue certificates for all patents filed and registered. In that portion of the same act which relates to the fees that may be charged by the Secretary for his services there is the provision, clause 18 of section 9, that he may charge a fee of two dollars for registering and issuing a certificate of registration of a "United States patent, trade-mark, print, label or copyright." Whether the words "United States" qualify only the word "patent" which immediately follows it, or whether they are to be deemed as also qualifying the words "trade-mark" and the other words that follow, is a question that must be solved in a practical way. If they qualify only the word "patent," I am of the opinion that the clause in question furnishes sufficient foundation for action by the Secretary upon applications for the registration of trade-marks; but if they also qualify the words "trade-mark," then the Secretary's duty would be limited to the registration of a "United States trade-mark;" and the duty of considering an application for the registration of a Porto Rican trade-mark would seem to be lodged with the Commissioner of the Interior

¹ The legislative assembly at its session in January, 1902, enacted a general law for the registration of trade-marks.

under General Orders 102 of 1900, above referred to. As a practical question, and because the propriety of having the power lodged with the Secretary is manifest, I incline to the opinion that the Secretary may exercise the power under clause 18 of section 9 of the act relating to the duties of the Secretary until the legislative assembly shall have removed any doubt from the question by some legislative expression.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

INHERITANCE TAX—ESTATE LEFT BY HUSBAND.

Sections 94 and 95 of the revenue law construed and held to exempt an estate left by a husband from an inheritance tax, although they impose such a tax upon an estate left by a wife.

OFFICE OF THE ATTORNEY-GENERAL,

July 18, 1901.

SIR: In reply to your communication of the 12th, asking for a construction of sections 94 and 95 of the revenue law in connection with the assessment, for the purpose of inheritance taxation, of two shares in the estate of Andrea Alimestica y Espinosa, of Vieques, I have the honor to say that upon a close examination of the two sections it appears that the exemptions contained in the former relate to an estate left by a *husband* for the use of his wife, child, grandchild or person legally "recognized" as an adopted child; while the affirmative provisions of the latter section relate to a devise or bequest by a *wife*.

The case stated in your communication comes under section 95; and being a bequest by the mother to her lineal descendants the shares passing to them, whether they be legitimate or illegitimate, are subject to the tax provided in that section. It follows of course that a natural recognized child takes a bequest under section 95 subject to the tax therein provided. Under section 94 property passing by the will of a deceased father to a natural "recognized" son is exempt from an inheritance tax.

In other words, it is clear that in these two sections a distinction is made by the legislature between the death of a husband and

the death of a wife. Upon the death of the former, who in common experience is the one that provides maintenance for his family, the legislature requires no tax from the estate that passes to his family, apparently upon the principle that the loss of his support by the family is a sufficient reason for the exemption of the family from the burden of taxation. On the other hand, in section 95 the apparent purpose of the legislature was upon the death of a wife to tax the estate passing to the husband and her lineal descendants on the theory that the husband, the source of family maintenance, is still able to support his family, and that the state may justly participate in the inheritance by levying a tax upon it.

Very respectfully,

JAMES S. HARLAN.

The [•]ACTING TREASURER.

SCHOOL LAW—APPOINTMENT OF SCHOOL TRUSTEES.

Section 32 of General Orders 160 of the series of 1899, being in irreconcilable conflict with the provisions of section 8 of an act entitled "An Act to establish a system of public schools in Porto Rico," approved January 31, 1901, must be held to have been repealed by force of the repealing clause of the latter law.

OFFICE OF THE ATTORNEY-GENERAL,

July 18, 1901.

SIR: The act entitled, "An Act to establish a system of public schools in Porto Rico," approved January 31, 1901, to which you call my attention in your communication of yesterday contains in section 27 the usual clause repealing all laws, decrees and orders in conflict with its terms.

The question before me then is whether there is any conflict between sections 7 and 8 of that act, and section 32 of General Orders No. 160 of 1899.

Both sections 7 and 8 upon examination will be found to be complete. In other words in the one the removal of a school director may be effected for proper cause; and in the other the vacancy thus created or created by death, resignation, removal from the district, etc., may be filled. Neither section there-

fore needs the aid of any other law in order to make it operative. Upon comparing section 8 of the act with section 32 of the order, it will be seen that the latter comes into direct conflict with the former. Section 8 of the act provides that appointments shall be made by the district court upon the nomination of the Commissioner of Education. Section 32 of the order provides that the municipal judge shall send in the name of the candidate of the party in which the vacancy exists who received the next greatest number of votes at the election. It is very clear that this provision is in irreconcilable conflict with the provision of section 8. I am of the opinion therefore that section 32 of General Orders No. 160, series of 1899 has been repealed by force of the repealing clause of the act.

Very respectfully,

JAMES S. HARLAN.

The COMMISSIONER OF EDUCATION.

TAX ON INSURANCE PREMIUMS—FOREIGN CORPORATIONS.

Paragraph 1, section 65, of the revenue law, providing for an annual tax of three per cent on the gross amount of dues collected in Porto Rico by surety, insurance or building and loan companies not incorporated in Porto Rico, is a valid exercise of the taxing power lodged in the insular government.

Under the organic act the insular government enjoys the same general powers of taxation that are enjoyed by the states and territories of the United States.

The fact that premiums collected here are taxed in Canada does not affect the right of taxing them here.

The issuing of insurance policies on property in the island is a local transaction and constitutes business done in the island. It is therefore subject to the taxing power.

OFFICE OF THE ATTORNEY-GENERAL,

July 24, 1901.

SIR: On the 2d of June last Mr. F. H. Dexter presented to me an argument in support of a protest made by him on behalf of the Manufacturers' Life Insurance Company of Montreal, Canada, against the collection annually of a tax of three per cent on the gross amount of the premiums or dues collected in Porto Rico by surety, insurance or building and loan com-

panies not incorporated in the island. The provision in question will be found in paragraph 1, section 65, of the revenue law.

The protest is based upon three grounds:

1. That there is no authority in law for the levying of any taxes by the insular government against the insurance company in question other than the real and personal property tax; and that no franchise tax can be levied against the company.

2. That a tax upon premiums collected in Porto Rico is illegal because it impairs the obligation of contracts already made and deprives the creditor of the value of his obligation.

3. That such a tax is illegal because premiums are payable in Canada, where they are also subject to taxation.

As to the first ground, no extended discussion is necessary. The organic act constitutes certain inhabitants and residents of Porto Rico a body politic under the name of The People of Porto Rico with certain governmental powers, among which is the power to tax. There is no limitation upon this power, or any language in the act to indicate an intention on the part of the Congress of the United States to withhold from the insular government the general power of taxation. This is manifest from the terms of the third section, where reference is made to "a system of local taxation to meet the necessities of government." This language is too broad to admit of any doubt of the nature suggested by Mr. Dexter. Moreover in section 32 it is expressly provided that the legislative authority shall extend "to all matters of a legislative character." It therefore appears that all powers of taxation enjoyed by the states and territories of the United States are within the legislative competency of the government created by the act commonly known as the Foraker act.

The other two points suggested by Mr. Dexter can be readily disposed of if a clear understanding is first had of the status of a foreign corporation in the island of Porto Rico.

It must be remembered in the first place that a corporation is an artificial and not a natural person. It does not therefore come within the terms of clause 1, section 2, of article IV, of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. This provision gives

a citizen of one state the right freely to go into another and to transact his business there on the same terms and conditions that are enjoyed by the citizens of that state. But in this sense a corporation is not a citizen, and cannot go into a state other than the one creating it without the consent of that state.

In *Hooper v. California*, 155 U. S. 648, it is said that a state has the power to exclude foreign insurance companies altogether from its territory, and that if it allows them to enter the state it may determine the conditions on which the entry shall be made; that, as a necessary consequence of this, it has the right to enforce any condition imposed by its laws as preliminary to the transaction of business within the limits of the state; and that the power to exclude such corporations embraces the power to regulate them and to enact and enforce all legislation in regard to things done by them within the state.

In *Paul v. Virginia*, 8 Wall. 168, the court, disposing of the proposition that foreign corporations are protected by the provision of the Constitution above cited, says that a state may give its consent to the entry of a foreign corporation upon such terms and conditions as it may think proper. It says:

They may exclude a corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. *The whole matter rests in their discretion.*

The government of Porto Rico has seen fit to impose a tax of three per cent on the premiums collected in the island by foreign insurance corporations. It is competent for that government to do this either as a condition of the right of such a company to enter its territory and do business here, or as a condition of the right to remain here and to continue to do business in the island. The leading case of *Liverpool and London Life and Fire Insurance Company v. Massachusetts*, 10 Wall. 566, is a case of this kind. There also the constitutional provision above mentioned was invoked by a corporation of England doing business in Massachusetts, as a protection against a tax of four per cent on the gross amount of premiums collected by it in Massachusetts. The language of that statute is so much like the language of paragraph 1 of section 65 of our revenue law that I quote it here in full. It is as follows:

40 *Tax on Insurance Premiums—Foreign Corporations.*

Each fire, marine and fire and marine insurance company incorporated or associated under the laws of any government or state, other than one of the United States, shall annually pay to the treasurer of the commonwealth a tax of four per cent upon all premiums charged or received on contracts made in this commonwealth for insurance on property.

The only difference between that case and the case presented by Mr. Dexter is that the latter is the case of a Canadian corporation instead of an English corporation. The court had no difficulty in sustaining the law.

Such being the relation between the government and a foreign corporation, I come now to the second objection urged by Mr. Dexter, viz., that the law impairs the obligation of contracts, and therefore is invalid. In making this point he does not claim the existence of any contract between the insular government and his client, but refers to the insurance contracts between his client and the holders of its policies.

It is sufficient in reply to this objection to say that the contract clause of the Constitution of the United States has no application to his case, (1) because Porto Rico is not a state; (2) because a mere license tax upon business done, or a tax on property or property rights, furnishes no occasion for invoking that clause of the constitution.

A person in any jurisdiction acquires property or makes contracts or builds up his business subject to the exercise by the government of the power of taxation at any time when, in its judgment, the public interests require it. The power to tax is one that is never to be regarded as surrendered by the government, except where it has made a particular contract under which for a consideration it expressly waives the right to tax; for example, a franchise granted by this government to a railroad company exempting it from general taxation in consideration of something done by it for the public benefit. In the absence however of such a particular contract on the part of the government the power of the government to tax property and property rights and all forms of commercial activity, such as an insurance business, remains unimpaired. If this were not so the contracts made by or with the various classes of commercial interests would result in preventing the government from levying any tax upon commercial activities. A citizen may contract for all the sugar produced on a certain estate at

a given price for a period of ten years; if Mr. Dexter's argument is sound, such a contract would prevent the subsequent levy by the government of a special tax upon the sugar industry. An owner of property makes a mortgage upon it for a period of ten years, and at a time when no tax upon credits is in force; if Mr. Dexter's argument is sound such a mortgage would prevent the government from levying a tax upon mortgage credits. Again, a man owning a piece of real estate may rent it for a period of ten years. At the next session of the legislature a law may be passed levying a tax upon rents; and if Mr. Dexter's argument is sound, such a law would be invalid, because it impairs the obligation of the contract between the parties. Instances might be multiplied to show the fallacy of that ground for protest. And yet all the cases supposed differ in no essential respect from the case presented by Mr. Dexter. An insurance company grants insurance to various residents of the island in consideration of the payment, not of rent, but of an annual premium. Subsequently the legislative assembly levies a tax upon this insurance business by requiring the payment to the Treasurer of Porto Rico of three per cent upon the annual premiums collected. In what sense does this impair the obligation of the contract between the company and its policy holders? Plainly it is nothing but a tax, and has the same result, and only the result, that any tax has upon property or commercial activity.

I need not discuss the last point urged by Mr. Dexter. The business of soliciting merchants to insure their property is carried on here; policies are delivered here; and the premiums are collected here by the agents of the company. For doing this paid agents are employed, and upon such business, it is fair to assume that profits are earned. Clearly this is business done in Porto Rico, upon which the government of Porto Rico may properly levy a tax. As was said in *Paul v. Virginia, supra*: "They (insurance policies) are local transactions and are governed by the local law." Mr. Dexter's client transacts all this business in Porto Rico. The fact that a tax is levied upon the receipts of the company by the government of Canada furnishes no basis for the proposition that the government of Porto Rico may not also levy a tax upon them.

For these reasons I am of the opinion that the law in ques-

42 *Municipal Councils—Debtors for Taxes not Eligible.*

tion is a valid exercise of the power of taxation ; that it took effect on the date of the approval of the law ; and that it covers all insurance premiums received since that date, whether on policies issued by the company before or after that date.

Respectfully,

JAMES S. HARLAN.

The ACTING TREASURER.

MUNICIPAL COUNCILS—DEBTORS FOR TAXES NOT ELIGIBLE.

A person against whom a suit has been instituted for delinquent taxes is not eligible to become or to remain a member of a town council.

OFFICE OF THE ATTORNEY-GENERAL,

July 27, 1901.

SIR: In reply to your communication of the 26th of July, I have the honor to inform you that it is not competent for a citizen of a municipality who is a debtor as a taxpayer to the municipal treasury, upon which indebtedness a suit has been instituted against him, to become or to remain a member of the town council.

Under section 4 of General Order 160, of 1899, it is provided that only those taxpayers of the municipality who are included in the first two-thirds of the whole list of taxpayers and who are otherwise qualified to vote, are eligible for election as members of the town council ; but if he happens to be just outside of the two-thirds list, and nevertheless pays an amount of tax equal to the lowest amount paid by the last citizen on that list, he is still eligible.

Members of the liberal professions (and civil engineers and dental surgeons) are eligible even when not taxpayers at all.

Very respectfully,

JAMES S. HARLAN.

The ACTING SECRETARY.

INCOMPATIBILITY OF OFFICE—SCHOOL TRUSTEES.

Under the law a certain percentage of municipal funds is set aside each year for school purposes, and if a member of a municipal council is permitted also to be a member of the school board his vote in the former capacity will in fact be an appropriation in his own behalf in his latter capacity; and therefore, under section 4 of article 43 of the law relating to the government and organization of municipalities, a member of a town council cannot lawfully be a trustee of the school board.

OFFICE OF THE ATTORNEY-GENERAL,

July 27, 1901.

SIR: I have the honor to acknowledge the receipt of your communication of the 23d of July, and in reply to say that under the express prescriptions of the law a member of the municipal council may not at the same time hold the office either of municipal judge, or notary public; nor can he fill the office of police judge. Under the terms of another section of the law relating to the government and organization of municipalities, he cannot be either a school-teacher or a member of the insular police force; nor may he hold the office of postmaster. A certain percentage of the municipal funds is set aside each year for school purposes, and if a member of the town council were permitted also to be a trustee of the school board his vote in the former capacity appropriating these funds would in fact be an appropriation in his own behalf in his latter capacity. And as the percentage of funds thus appropriated is under the law as it now stands a matter of discretion with the town council, varying between a minimum of 10 per cent and a maximum of 20 per cent of the municipal receipts, it will readily be seen how his duties to the municipality may come into a conflict with his duties to the school board, and *vice versa*.

For these reasons, under section 4 of article 43 of the law relating to the government and organization of municipalities, I am compelled to hold that a member of the town council cannot be a trustee of the school board.

Very respectfully,

JAMES S. HARLAN.

THE ACTING SECRETARY.

INSULAR CONTROL OF HARBORS AND PILOTS.

The United States has no title, in the several states, to the shores of the high seas or to the lands under them, or to the shores of the ports and harbors or the lands under them, or to the navigable rivers and the lands over which they run, except as such title may have been reserved from the public domain or may have been acquired by purchase for naval, military or other public purposes.

Until Congress by general legislation and in the regulation of commerce takes control of the matter the several states may adopt police regulations governing the use of the harbors within their limits; they may enact quarantine and inspection laws, and may make sanitary regulations and port rules; they may establish penalties for the infraction of such rules and regulations, and appoint harbormasters and other officials to enforce them.

The reservation by the United States in section thirteen of the organic act of Porto Rico of the control of the "harbor areas or navigable waters" was in the interest of commerce and navigation, and was not intended to exclude the insular government from enforcing proper police and sanitary regulations in its harbors and tidewaters.

The port regulations and pilot rules established by General Orders 133 of the series of 1899, and all other laws relating to waters, not repealed or modified by military authority, by the organic act or by subsequent legislation, are still in full force. And under their authority the Governor may appoint a captain of the port of San Juan.

OFFICE OF THE ATTORNEY-GENERAL,

July 29, 1901.

SIR: It would be an interesting labor to endeavor to lay before you an accurate statement of the law in relation to tidewaters as it has come down to us from the common law of England through the colonial governments to the states of the United States, and to enter upon a review of the changes and developments through which it has since gone. But in view of the fact that other matters of a public nature are engaging your attention and of the fact that my own time is similarly occupied, I shall, in reply to your communication of the 12th, inviting my attention to section 13 of the organic act, and requesting my opinion as to the right of this government to establish and enforce police regulations in the harbor of San Juan, state the law as I understand it, as briefly as possible.

Under the common law of England the king in former days claimed in his own right the title to the four seas surrounding his kingdom. But in later days this claim was limited to the

shores of the seas and harbors and to the lands under them. In these he had not only a *jus publicum* but a *jus privatum*. From the high-water mark for one marine league the lands under the seas were the king's in his public and private right.

He was seized of the same title in his American possessions, although neither his public nor private right was ever strongly asserted. Had either been insisted upon the claim, as said in *Bell v. Gough*, 25 N. J. L. 624, would have been considered an intolerable evil, and would have been found enumerated among the grievances that brought on the revolution. But when the revolution took place the several colonies became independent sovereign governments, and succeeded to the title of the king in the navigable waters, and to the soil under them, for the common use and benefit of the people. Upon the organization of the present government of the United States this title, not having been granted to the general government, remained in the respective colonies or states.

It thus happens that the United States, unlike England and the continental powers, has no title to the shores of the high seas or to the lands under the tidewaters or to the shores of the ports and harbors of the union or to the lands under them, or to the navigable rivers and the lands over which they run; except such as it has reserved from the public domain or has acquired by purchase for naval, military or other public purposes.

The title to the harbors and tidewaters being vested in the several states, the activities of commerce made it necessary that measures should be taken for the general public use of them. The states have therefore adopted general police regulations governing the use of the harbors within their respective limits. They have their port rules, their quarantine and inspection laws and sanitary regulations. They have adopted rules governing the compensation of pilots, the speed of vessels in the harbors, and the places at which vessels may lie at anchor. They have established beacons and buoys, and have taken other precautions for the common good. And they have adopted laws imposing penalties for the infraction of any of these regulations. They have established dock and harbor lines and authorized the building of bridges and wharves. They have made laws also to control the fisheries in the harbors and in the

waters adjoining the shores. By the appointment of harbor-masters and other officials they have generally exercised the supervision necessary in order that the public might have adequate protection in the use of public waters and that proper sanitary conditions might be preserved. These rules and regulations adopted by the several states have repeatedly been brought before the Supreme Court of the United States on the theory that they offended certain clauses of the constitution; but they have uniformly been upheld by that court as valid in the absence of legislation on the subject by Congress.

It thus appears that the police laws and regulations in relation to the ports and harbors, which in other countries are to a large extent exclusively matters of national concern, in the United States are subjects of legislation, supervision and control by the several states and territories of the union. The only modification of the title of the states to their harbors and adjoining seas comes from the fact that when adopting the federal constitution the states yielded to the central government the right to regulate commerce among the states and with foreign nations, and gave to the judicial power of the United States jurisdiction over all maritime and admiralty cases. It must be borne in mind however that this was not a grant to the United States of the harbors and adjoining seas, but only a grant of the right to regulate commerce in and upon them.

The result of this constitutional provision has been to impress upon the title of the states a limitation in favor of the federal government, under which that government may restrain any use by the states of its waters or the lands under them, that interferes with navigation or commerce. It is a broad power and is paramount whenever it comes into conflict with local regulations and laws. It implies and embraces the power to adopt certain police regulations; but such regulations are limited strictly to matters that are in aid of commerce. The United States has no power on any other ground to adopt or enforce harbor rules or regulations.

The right of the states to the tidewaters and lands under them is so completely a part of our political system that the Supreme Court of the United States in a recent case has held that grants by the United States of portions of its public lands bounded by navigable waters convey no title or right below

high-water mark, "*and do not impair the title and dominion of the future state when created ; but leave the question of the use of the shores to the sovereign control of each state.*" *Shively v. Bowlby*, 152 U. S. 1.

In the same case the court, speaking by Mr. Justice Gray, after a very complete reference to the authorities, reached this conclusion (p. 57) :

Upon the acquisition of a territory by the United States whether by cession from one of the states or by treaty with a foreign country or by discovery and settlement, the same title and dominion (that enjoyed by the original states in their tidewater lands) passed to the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory. The new states admitted into the union since the adoption of the constitution have the same rights as the original states in the tidewaters and in the lands under them within their respective jurisdictions.

And it was further declared by that court to be the policy of the United States to leave (p. 58) "*the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the states respectively when organized and admitted into the Union.*"

In fact the federal government has no general legislation for the policing of the harbors and ports. A captain of the port or harbor-master is an officer unknown to the statutes of the United States.¹ It was for this reason, when the military power in this island was withdrawn and the insular government inaugurated, that the commandant of the United States naval station in Porto Rico refused further to perform the duties of captain of the port at San Juan, or to supervise and direct the performance of the same duties in the other ports and harbors of the island. No such civil jurisdiction existed under the laws of the United States, and therefore a federal military officer could no longer continue to act. On the other hand, in every harbor of the several states is a state officer generally called the harbor-master, who, acting under the au-

¹ The first provision for the appointment of a federal official with duties of the character of those of a harbor-master, so far as my investigation disclosed, is found in chap. 496, Rev. Stat. Sup. 1874-91. There a line officer of the navy is designated as supervisor of New York harbor, and in protection of commerce and navigation he has the power to prevent the deposit of garbage and other materials in that harbor.

thority of the state, enforces the laws and police regulations adopted by the state for the government of its harbors.²

I have referred to these matters at some length for the reason that in construing a law it is proper to consider the political system of the government that enacted it. Upon slight grounds a law will not receive a construction hostile to that system. If Porto Rico were a state of the Union, under the declared policy of the United States as indicated in the case cited, there could be no difference of opinion as to the meaning of section 13 of the Foraker act; for then the title of Porto Rico to its harbors and tidewaters, and the lands under them, would be complete, except as Congress might control them in aid or regulation of commerce. Porto Rico is not a state, and its form of government, so long as it is not incorporated into the Union, may be changed and modified or altered at the will of Congress. Nevertheless it is evident from the terms of the Foraker act that it was the intention of Congress to invest the present government with full civil and political powers, and to establish here a complete, though subordinate, sovereignty. In the amplitude of its system of laws, in the complexity of its form of government, and in the dignity of its civilization and the extent of its commerce, the government of Porto Rico corresponds much more closely to the government of a state of the United States than to the government of an organized territory subject to the paramount authority of the nation. Moreover it must be borne in mind that neither in the organic act of this island nor in its general or special statutes has the United States made any provision or appropriated any funds for the police and sanitary regulation of our harbors. If the island therefore is not able under its constitution to do this work, which is of importance both to its commercial prosperity and to the health of its people, it may not be done at all.

For these reasons I am of the opinion that the section in question should be interpreted liberally, to the end that these duties in connection with the harbors may not be unperformed. And upon such a construction the reservation by the United States of control of the "harbor areas or navigable waters" leads to

² In art. 30, chap. 802, U. S. Rev. Stat., is a recognition by Congress of the right of the states to enact regulations for the government of harbors and inland waters.

the inference that the Congress of the United States intended, until it had further legislated in connection with the matter, only to reserve to the United States the same paramount right in the navigable waters and harbors of Porto Rico that it enjoys under the constitution in the other harbors of the United States; that instead of extending the commerce clause of the constitution to Porto Rico, Congress accomplished the same result by a statutory reservation in the interest of commerce and navigation; that it was not intended by the reservation to exclude the insular government from enforcing proper police and sanitary regulations in its harbors and tidewaters; and that the tidewaters of Porto Rico and the lands under them, subject to the paramount authority of the federal government in aid of commerce and to its power to make other disposition of them, rest under the control of the insular government on the same basis on which rests all other property "which may have been acquired in Porto Rico by the United States" and which by the United States has been turned over to this government under said section 13 of the organic act.

It follows that the port regulations and pilot rules for Porto Rico established by General Orders 133 of the series of 1899, and all other laws relating to waters not repealed or otherwise modified by military authority, by the organic act or by subsequent legislation, are still in full force in this island. Under General Orders 133 I am of the opinion that it is competent for the Governor of Porto Rico to appoint the senior officer of the United States navy stationed at San Juan captain of the port of San Juan. I am also of the opinion that in the event of the refusal of said officer to act in that capacity, it is competent for the Governor of Porto Rico to appoint any one else to that office. The general order has the force of law and it is the duty of the Governor of Porto Rico to carry it out. The refusal of the United States naval officer to act cannot be allowed to work a practical repeal of the law, and in case of such refusal it is clearly competent for the Governor to appoint some one that will act.

I have the honor, sir, to remain your obedient servant,

JAMES S. HARLAN.

THE GOVERNOR.

NOTE: Attached to the foregoing communication was a memorandum of

cases in support of the conclusions reached. The cases cited are *Steamboat New York v. Rae*, 18 How. 223; *Smith v. Maryland*, 18 How. 71; *City of New York v. Miln*, 11 Pet. 102; *Brig "James Young" v. Ship "John Fraser,"* 21 How. 184; *In re McNiel*, 13 Wall. 236; *Prosser v. Northern Pacific Railroad Company*, 152 U. S. 59; *Shively v. Bowlby*, 152 U. S. 1. Also Gould on Waters, and Rev. Stat. U. S. sections 4236, 4444 and 4782.

MAYAGUEZ WHARF—INSULAR PROPERTY.

The board of harbor works of Mayaguez had no authority in law to dissolve itself upon the approach of the American troops and to turn its property over to the municipality of Mayaguez.

Under the treaty of Paris and under the organic act that wharf is now insular property, to be administered by the central government for the benefit of the people of Porto Rico.

The municipality of Mayaguez should be required to account to the insular treasury for moneys turned over to it by the harbor works board, and for moneys subsequently collected by it for the use of the wharf by shippers.

OFFICE OF THE ATTORNEY-GENERAL,

September 27, 1901.

SIR: In his communication of the 2d of July to the president of the board of public works, the alcalde of Mayaguez makes allusion to some facts, said by him to appear upon the records in the archives of that municipality, which tend to show that the wharf in the harbor of Mayaguez and the buildings appurtenant to it were erected in 1836 under the authority of the Spanish government with municipal funds. It is also stated that the city officials of Mayaguez continued in control of the property and to receive its revenues from the date of its erection until 1886, when it was taken possession of by the board of harbor works of Mayaguez.

This board, created by royal decree, which became effective in Porto Rico on the 28th day of December, 1886, was a national and not a municipal body. It took possession of the property in question on behalf of the general government in control of the island at that time. To that government alone it was required to report and to it alone was it responsible for its acts and doings. The wharf and adjoining buildings remained thus in the possession and control of the general government for a period of twelve years immediately preceding the American occupation of the island. During those years the

revenues and income therefrom were collected by that board and not by the municipality.

It would seem proper to assume that the Spanish government in taking possession of the property acted upon principles of justice, and that it had the consent of the municipality, or if not, that such equities as existed in favor of the municipality were at that time properly adjusted. But these are considerations which in my judgment cannot now be inquired into by the government of which you have the honor to be the distinguished chief magistrate; for the United States and the kingdom of Spain in their sovereign capacity as the high contracting parties to a treaty of peace have definitely settled the question of title as will hereafter be more fully referred to. It may be well however at this point to call your attention to the fact that it is nowhere controverted on the enclosed papers that the Spanish government had the power to establish a board of harbor works and through it to take possession of the property. Nor am I informed that the existence of this power was ever denied. For a period of twelve years the validity of its action in so taking the property remained unquestioned so far as I can learn. Nor is doubt now cast upon it by the municipal officials as a proper exercise of the powers lodged in that government.

All this in substance seems to be conceded by the alcalde and those who have expressed opinions on the accompanying documents in favor of the title of the municipality to the property. But in his zeal to establish some sort of basis for the title thus asserted, the alcalde of Mayaguez is content to rest his claim upon a certain resolution said to appear upon the record of the proceedings of the board of harbor works of Mayaguez, held on the 31st day of August, 1898. A document purporting to be a copy of this resolution accompanies the papers enclosed herewith. It is as follows:

Third. The president said: That owing to the peculiar situation of the board, whose creation and existence, although well justified at the beginning, has been for a long time, and more so to-day, a useless body and prejudicial to the public, also it being of no benefit whatever to the locality; that to-day, on account of the invasion of the North American troops, it being completely cut off from its head, the Spanish government of the island which authorized it to act by itself with absolute independence, it was his opinion, and he submitted to the judgment of those present, that

this board should dissolve itself. The members present agreeing in all with the president, resolved to abolish the board of harbor works of Mayaguez.

In order that all the facts in the case may be before you, it is necessary here to state that shortly after the passage of this resolution the municipality of Mayaguez entered into possession of the property thus abandoned by the harbor board ; and that since that time it has continued to receive the revenues derived therefrom.

The resolution, as will appear from the enclosed letter from the alcalde of Mayaguez, seems to be the sole basis of the title claimed by that municipality. It is asserted by the alcalde that as a consequence of the resolution, and through some sort of reversion, the title to the property now rests in his municipality.

This theory of reversion is advanced without any endeavor to show that the municipality at any time ever had any title to the shore lands or the lands under the water upon which the wharf is built ; or that it ever enjoyed anything more than a mere license to build a wharf thereon, and to collect the revenues therefrom. Moreover I am informed by those who ought to know that at the time the board took possession of the property its physical condition was such as subsequently to require the rebuilding of it ; and that none of the material composing the original structure now remains, but that the wharf and sheds as they now stand were paid for out of the funds of the harbor board. But the Spanish government having the power to take the property, and its act in so doing having been acquiesced in by the municipality for a period of twelve years, these considerations are not material. I therefore recur to the resolution and the effect attributed to it by the municipal officials.

The proposition that the municipality of Mayaguez acquired any rights under that resolution is one that I am not willing to discuss seriously. On its face it does not even purport to be an act in relation to the title of the property. In substance it seems to be nothing more than a declaration by the members of the board then present that in view of the approach of the American troops their further presence would not be required.

But even if the resolution did purport to deal with or affect the title to the property, it is clear that it must remain of no

effect; for an examination of the royal decree referred to, from which were derived all the powers that the board had, will disclose absolutely no delegation to it of the power to make any disposition of the property. The decree is absolutely bare of the suggestion of such a power. The resolution cannot therefore be deemed in any sense an act in relation to the title. In fact granting to it every intendment in favor of the municipality, it seems to amount to nothing more than a mere adjournment. Any other theory of its meaning would be in total disregard of the fact that the board was not vested with any power to dissolve itself as it endeavored to do. It was created by the Spanish government for the purpose of performing an important public function. The suggestion that it had an inherent power to dissolve itself and legally disappear, and thus in effect to repeal a royal decree, does not in my judgment merit any further discussion.

It will not be necessary to prolong this review of the matter. As has been heretofore observed, the title to the wharf in the harbor of the municipality of Mayaguez and to the buildings appurtenant thereto has been adjusted by an authority which must be respected. And the law must be carried into effect not only by the officials of that municipality, but by the officials of the insular government. Under article 8 of the treaty of peace concluded at Paris on the 10th day of December, 1898, between the United States of America and the kingdom of Spain, and proclaimed at Washington on the 11th day of April, 1899, the wharves in Porto Rico were among other property ceded to the United States. By the terms of section 13 of the organic act the United States placed under the control of the insular government, "to be administered for the benefit of the people of Porto Rico," among other property, "all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Porto Rico." The royal decree creating the harbor works board for the municipality of Mayaguez was then in full force and effect in this island. It follows as a necessary consequence that the wharf and the adjoining buildings are now insular property, and that all revenues arising therefrom are to be collected and administered by the insular government for the benefit of the people of Porto Rico. The duty of the insular government in the prem-

54 *Marriage and Divorce—Section 8 of the Organic Act.*

ises is, therefore, clearly defined in the organic law of the island. In compliance with that constitutional mandate I recommend that immediate possession of the property be taken under your authority and direction by the insular government.

I also recommend that the municipality of Mayaguez be called upon to account to the insular treasury for the sum of \$59,000, which at the time of the passage of the resolution above mentioned had accumulated to the credit of the board of harbor works of Mayaguez, and which sum, without authority of law, was turned over to that municipality. From some investigations that I have made I am led to believe that this was done upon the definite understanding that the amount would be repaid to the insular treasury in annual installments of \$10,000. The municipality, in my judgment, must also be called upon to account to the insular treasury for all moneys received by it from the said wharf from the date when it took possession thereof to the date of its surrender of possession to the insular government. It is said that for several years the municipality granted an annual subvention by way of aid to the board of harbor works. This is probably true, and in the accounting that fact may receive equitable consideration.

It seems that the registrar of property at Mayaguez has lately registered the title of the property in the name of the municipality, but this being done without authority of law may be deemed null and void.

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

MARRIAGE AND DIVORCE—SECTION 8 OF THE ORGANIC ACT
CONSTRUED.

That part of section 8 of the organic act which provides that "all persons lawfully married in Porto Rico shall have the rights and remedies conferred by law upon parties to either civil or religious marriages," was not intended to withdraw such rights and remedies from persons lawfully married elsewhere. The phrase "in Porto Rico," refers not to the locus of the marriage ceremony, but to the locus of the parties at the time of asserting rights and remedies under the marriage contract.

Article 9 of the civil code of Spain now in force in this island, which provides that laws relating to family rights and obligations, or to the status,

condition and legal capacity of persons, "obligate Spaniards even though they reside in a foreign country," is no longer in force in Porto Rico. And the fact that under the civil code of Spain a divorce may not be granted in Spain between Spanish subjects for the adultery of the husband, does not prevent the granting of a divorce for that cause between Spaniards residing in Porto Rico.

In the United States both marriage and divorce are subjects of municipal regulation, and the capacity or incapacity of persons domiciled in the United States to contract marriage or obtain a divorce is governed by local law and is not controlled by the law of the country of their nativity.

The theory of continental systems that nationality serves to fix the political status of a citizen, as well as his capacity and incapacity with respect to the domestic relations and property rights, has not been accepted in the United States. While the political status of a citizen of the United States is fixed by his nationality, his personal status depends upon the laws of the particular state of which he is a citizen, and as a state has no nationality or any international character, its laws cannot fix the capacity or incapacity of its citizens residing abroad in respect to the matter of the inheritance of property or of the domestic relations.

OFFICE OF THE ATTORNEY-GENERAL,
Essex, N. Y., *September 28, 1901.*

SIR: The recent unhappy event¹ which has plunged my countrymen into profound grief and sorrow so disturbed my own peace of mind and heart that it was impossible for some days to give serious thought to matters of an official nature. For this reason an answer has been delayed to the communication in which you request an opinion on the questions involved in an appeal pending in the Supreme Court of Porto Rico from a sentencia of the District Court of Mayaguez of the twenty-second day of November, 1900, in a divorce suit wherein Maria del Carmen de Marimon is complainant and Francisco Pelegri y Roger is defendant.

The translation of the sentencia which you were kind enough to have prepared for me contains defects so obvious and passages so obscure as to leave me in some uncertainty as to the actual facts in the case and as to the exact course of the reasoning of the court in deciding it. I am compelled therefore in this communication to forego any discussion of the facts, and, without venturing upon an expression of opinion on the merits, to confine my observations entirely to certain conclusions of law

¹ A reference to the assassination of President McKinley.

that seem to have been reached by the learned district court, leaving other questions that may be suggested to your own wise judgment. I trust however that with your accurate knowledge of the facts of the case, as shown upon the sentencia in Spanish, and upon the record accompanying it, you will be able from what is here said to form a conclusion as to the principles of law that ought to control in your presentation to the court of the questions involved.

The District Court of Mayaguez, assuming the truth of the facts alleged in the petition, dismissed the suit at the cost of the complainant, and in so doing assigned two grounds in law for its action :

1. That under the terms of article 9 of the Foraker act the parties, not having contracted marriage in Porto Rico, are excluded from the rights and benefits that attach to persons who have contracted marriage within the island, and therefore Maria's petition must be denied.

2. That the defendant Pelegri, being a Spanish subject, is attended wherever he may be domiciled by the Spanish law in relation to marriage and divorce ; and as that law does not permit of an absolute divorce but only a judicial separation, the petition of Maria cannot be granted in Porto Rico.

I shall discuss these propositions in their order.

I.

It will be observed that the primary object of section 8 of the organic act is to continue in force and effect in the island, so far as not inconsistent with that act or with the statutory laws of the United States locally applicable, all laws, ordinances, military orders and decrees in force at the date on which the act took effect. There are two provisos attached to this legislative intent : One, which changed the old law and makes adultery on the part of the husband a ground for divorce as well as adultery on the part of the wife ; the other amends the Spanish law then existing so as to permit the marriage of priests and ministers notwithstanding the vows they may have taken to the contrary. As a part of this proviso and incorporated in it as a part of the same sentence follows this language :

and all persons lawfully married in Porto Rico shall have all the rights and remedies conferred by law upon parties to either civil or religious marriages.

It is not to be denied that the construction of this portion of the proviso presents some difficulties. But although the Foraker act has the force of a constitution, and therefore must receive a more strict construction than a statute, nevertheless the court will endeavor to extract from it a meaning that is consistent with reason and logic. When so considered the language may have one of two meanings :

1. Being a part of the proviso repealing the prior law forbidding priests and ministers to marry because of their vows, and being a clause in the same sentence, there is force in the thought that it refers to the subject matter of the language immediately preceding it in the proviso ; that it was intended to relate back to "the marriage of priests, ministers or followers of any faith," and to mean "all (*such*) persons," *e. g.*, "priests, ministers or followers of any faith ;" as if the Congress of the United States had intended not only to annul and repeal the prior law, but to put in the insular constitution an affirmative recognition of such marriages, should they occur, and thus to bring the law of Porto Rico into conformity with the spirit of American institutions in that respect.

2. If the language of this part of the proviso is to be taken as conveying a thought distinct from the thought immediately preceding it, as if it were a new sentence, then it would seem that the legislative intent was as if it read "*and all persons in Porto Rico lawfully married shall have all the rights,*" etc.

If the phrase, "in Porto Rico," is to be taken as establishing the locus of the marriage as distinguished from the locus of the parties at the time of asserting rights and remedies under the marriage, it will result that citizens of Porto Rico are divided into two classes : First, citizens whose marriages were celebrated in the island ; and, second, citizens whose marriages were celebrated elsewhere, for example, in the United States. Why, it may well be asked, should the Congress of the United States seek to establish these two classes of citizens in Porto Rico ? What reason is there in public policy for discriminating between them and for conferring rights and remedies upon citizens whose marriages are celebrated in Porto Rico, and withholding those rights and remedies from citizens of Porto Rico whose marriages were celebrated in the United States ? This consideration is an important one, because in the progress of time not only is it

likely, but it is to be hoped, that the union of the two people will grow closer and that intermarriages will become more frequent, so that in the generations to come the relations between them may be strengthened as well by family ties as by patriotic sentiments.

Moreover if the phrase "in Porto Rico" is to be taken as establishing merely the locus of the marriage, it results that the clause in question is a superfluous declaration by the Congress of the United States. If that is the meaning of the phrase, then in substance the whole clause is merely a declaration that all persons lawfully married in Porto Rico shall have the rights conferred upon them by lawful marriage; in other words, that lawful marriage in Porto Rico is lawful marriage in Porto Rico.

The translation of that part of the sentence in which the clause in question is discussed by the lower court is so imperfect that I shall not attempt to quote from it. The learned court however seems to give to the clause an effect which excludes persons not "lawfully married in Porto Rico," but lawfully married elsewhere, from the rights and remedies in this island that attend persons that are lawfully married in Porto Rico. I am not able to concur in this conclusion. For it is not possible that the Congress of the United States with deliberation or even through inadvertence could by solemn enactment withdraw from Americans and from foreigners settled here, in the relation of matrimony contracted elsewhere, the recognition of those rights and benefits that attend that relation in the case of those whose marriages occurred within the island. In my judgment, if the phrase, "all persons lawfully married in Porto Rico," must be interpreted as fixing only the locus of the marriage and not the locus of the parties at the time of claiming rights under the marriage, then while the clause has the force of conferring the rights and benefits of the marital relation upon those whose marriages are celebrated in the island, it must not be deemed to have the force of withholding those rights and benefits from those whose marriages were celebrated without the island.

II.

The second ground assigned by the district court for dismissing this suit presents an interesting question of private international law which has been the subject of much discussion by eminent writers.

Private international law has grown with the growth of commerce between the powers, and its present advanced state is largely the result of the perfection of the instruments of commerce, like the railroad, the steamship and the telegraph, which by annihilating space and time have made a family of the nations of the earth, bringing them so closely together in political and commercial intercourse that travel between them has become not only frequent but in fact commonplace. In its development no one phase has attracted more attention or has been the occasion of more discussion than the question of the permanency of the nationality of a subject or citizen in relation to his political status, and the effect of his nationality on his civil or personal status in foreign lands. Many of the European states had found it necessary, in order to preserve their populations and thus to keep themselves in the strongest condition for offense and defense, to pass laws intended to restrict the freedom of emigration. This led to the development of the theory that a subject might not lay aside his nationality or allegiance without the consent of the state. In the United States, on the other hand, emigration is almost unknown, while immigrants by countless thousands have come to our shores and have helped to populate and build up the western states and territories. Of necessity therefore it has been the policy of the United States to adopt the principle that nationality may be laid aside at the will of the subject and a new nationality acquired; and the Congress of the United States, annulling all previous declarations to the contrary, solemnly announced this principle on July 27, 1868, in an act which declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty and the pursuit of happiness." This declaration led to much international discussion and diplomatic correspondence. But to the credit of the United States the result was that the doctrine of the right of expatriation has now been almost universally accepted.

Out of this theory of nationality in its public sense has survived among many of the European nations a theory of nationality in its private international aspect. In those states, such as Belgium, Italy, and (as the learned District Court of Mayaguez has pointed out) Spain also, the theory is that nationality

is so indelibly impressed upon a subject that it follows him wherever he may go, as his ubiquitous personal law by which his personal legal capacities and incapacities are to be tested in whatever forum he may happen to be a party litigant. Under that theory a subject of the King of Italy, who under the laws of Italy, may not marry without the consent of his parents until he has reached the age of twenty-five years, is held by the courts of Italy incapable of marriage in the United States without such consent, notwithstanding he may be domiciled in the United States, where neither of these conditions is recognized by law. The Italian writers assert that, being an Italian, his capacities and incapacities are to be governed by the laws of Italy. It is on the same theory, if I clearly understand the *sentencia*, that the District Court of Mayaguez in the case in question has reached the conclusion that, inasmuch as under the laws of Spain an absolute divorce is not permissible to Spaniards domiciled in Spain, such a divorce in a case between subjects of his Majesty the King of Spain domiciled in Porto Rico may not be granted in a Porto Rican court, although our system of laws may admit of such a divorce in a case between our own citizens.

In a country of small territorial extent, where the climatic and other physical conditions having to do with its commerce and prosperity are not diversified, and where one system of laws is both possible and advantageous, the adoption of nationality as a test of the personal law of a subject is not difficult, although it doubtless leads to some inconveniences. The conditions in the United States however are different. While its most northern possessions lie within the arctic circle, Porto Rico is within the tropics. Along its other boundaries it touches two great oceans, on each of which it has a coast line exceeding in length the coast line of any European nation. A well-known writer has lately called attention to the fact that the area of the United States, excluding Alaska and excluding of course the newly acquired insular possessions, is equal to that of Great Britain and Ireland, Spain, Sweden, Norway, Germany, Austria, Holland, Belgium, Denmark, Portugal, Switzerland, Italy, Greece and European Turkey, together with the area of Palestine, Japan and China proper. The same writer declares that the state of Texas alone laid on the map of Europe would stretch nearly from London to Warsaw. Within this great empire and

between these extremes of latitude and longitude exist every condition of climate and soil and every kind of manufacture and industry to be found on the continent of Europe. In some of the states the agriculture is that of the temperate zone, while in others the products of a warm climate occupy the efforts of the people. In some states the rigors of winter are difficult to endure, while in others the warmth of the sun is never wanting. With such geographical and material diversities it would seem impossible to devise one set of laws to meet the necessities of the different parts of the country, or one central government that could properly legislate for it. Our forefathers therefore deemed it wise in framing the government of the United States to preserve intact the several local governments; and within the immense western domain the same practice has been adhered to; new states have been erected to govern and legislate for their own local conditions.

The United States is a government of enumerated powers, and a sovereign in its own sphere. But each state is sovereign as to the powers not surrendered to the national government. And it is within the sphere of the legislative competency of each of the states to enact laws governing the personal status of its citizens. Each of the forty-five states therefore has its own jurisprudence, its own system of laws touching the domestic relations and its own system of laws in relation to property and property rights. On the other hand the statutes of the United States contain no laws in relation to marriage or in relation to divorce. Upon that subject the national government has no authority outside of the District of Columbia or the organized territories of the United States. Nor do those statutes touch upon the relation of husband and wife, parent and child, master and servant, guardian and ward. Nor do they contain any laws with respect to the title of real and personal property, or with respect to the succession or inheritance of such property. In fact, as an eminent writer has pointed out, with the single exception of bankruptcy, the laws of the United States fix only the political, and not the personal and private status of its citizens in the sense in which the questions now under discussion are concerned.

It follows that while a citizen of the United States domiciled abroad may assert his nationality and refer to the laws of the

United States as fixing his political status abroad, he cannot assert his nationality as fixing also his personal status. His personal status is fixed only by the laws of the state of which he is a citizen. And as a state of the United States has no nationality or any international character, his state citizenship cannot tend to fix his personal status in foreign countries. Nationality, as that phrase is used in private international law to fix personal status, does not and never has existed in the jurisprudence of the United States. And as the United States cannot insist upon that test for its citizens residing or domiciled abroad, so our American jurisprudence does not permit such a test to be asserted on behalf of strangers or foreigners residing or domiciled here. The only test accepted in the United States of the personal status of a foreigner residing within its border is that of domicil. The American system demands that wherever its citizens may be domiciled they shall have the benefit of the law of that domicil. It insists on the other hand that whoever is domiciled within the United States, whatever may be his nationality, shall be subject to the laws of that domicil and entitled to the benefit of such laws.

The structure of our government necessarily required the adoption of this rule. The acceptance of nationality as the test of personal law would be followed by the gravest inconveniences and complications. Vast numbers of immigrants land upon our shores from all the countries of the earth. They may be said in some sense to retain their native nationality during a period of five years required by law before they may be naturalized and acquire our nationality. But if during that period these people are to retain their original nationality as a test of their personal capacity and incapacity in respect to marriage, divorce and the inheritance of property, it is apparent that great confusion would result.

These questions are learnedly discussed by Mr. Wharton in his work on the Conflict of Laws. Mr. Dicey, in his work on the same subject, chapter 7, states that the English courts have jurisdiction of proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings. He says :

This jurisdiction is not affected by the residence of the parties or the allegiance (nationality) of the parties, or the domicil of the parties at the time

of marriage, or the place of marriage, or the place where the offense in respect of which divorce is sought, is committed.

Mr. Justice Story in his work on the Conflict of Laws, 8th ed. 230a, sums up the whole discussion in this language :

Upon the whole the doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or the place where the offense for which the divorce is allowed was committed.

The weight of authority in the American decisions is that a suit may be brought in the state where either party is domiciled at the time of suit. This is of course a matter of regulation, and in many of the states it is provided that the complainant must for a given period of time have been a resident of the state in which he or she brings the suit, otherwise the courts will not take jurisdiction. The laws of Porto Rico are not accessible to me here, but you will know whether they contain any such provision. In this connection it may aid you also to know that it is a general principle of American law that the domicil of a married woman during coverture is in law the same as the domicil of her husband,¹ and changes with any change that he may make. From this point of view, Porto Rico being the domicil of the husband in the case in question, is also in law the domicil of the wife. The American law however gives her the privilege, for the purposes of a divorce suit, of acquiring a separate domicil if she wishes to do so, and where the separation from her husband is not due to her own wrong.

III.

There are one or two other matters to which it may be well to call your attention :

1. In its opinion the learned district court to some extent seems to deal with divorce as if it were an incident to the contract of marriage. I take it however that this is not the true legal aspect of divorce. The intention of the parties entering into a marriage contract is to sustain that relation throughout their natural lives. If occasion for a divorce should arise it is not to be deemed as one of the elements of the contract of marriage, but on the contrary rather as a penalty for a breach of

¹ See the Political Code of Porto Rico, Sec. 11 par. 5.

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the contract or as a punishment for an infringement of its conditions. In the American system of jurisprudence the whole question of divorce seems to be recognized as a proper subject for municipal regulation and not as a part of the marital contract. While no law may be passed in the United States to impair the validity of a previous lawful marriage, the right of divorce which may have existed at the time of such lawful marriage, may be amended or altogether abrogated. Bishop on Marriage and Divorce.

2. In its opinion the learned court also refers to article 9 of the civil code, which provides that laws relating to family rights and obligations, or to the status, condition and legal capacity of persons, "obligate Spaniards, even though they reside in a foreign country." The court recognizing that Porto Rico is now a foreign country with respect to the kingdom of Spain, nevertheless treats this article as if it were still in full force and effect in this island, and as if it controlled the disposition of the questions arising in this case because the parties to it are Spaniards. I am not able to assent to this. While it is true that article 8 of the organic act continued in force in this island the general system of laws theretofore existing, that article has reference only to the municipal laws, such as relate to the ownership and title to real property, police regulations, etc., etc. It does not, I take it, continue in force laws of a political nature that are contrary to the American system of government. I am of the opinion that article 9 of the civil code is of a political character, and that it ceased to be in force in this island when the political system theretofore existing was supplanted by an American system of government.

But this question seems to be disposed of, and that article of the civil code expressly repealed, by force of article 11 of the treaty of Paris, which provides that Spaniards residing in the territories ceded by Spain "shall be *subject in matters civil*, as well as criminal, to the jurisdiction of the courts of the country wherein they reside, *pursuant to the ordinary laws governing the same.*"

IV.

For your information and for such bearing on the question as it may appear to you upon the argument to have, I will add

further that in the interest of the institution of marriage, American jurisprudence, as a general rule, will recognize as lawful in the United States any marriage legally contracted abroad that is not inconsistent with our code of public morals or public policy. It will also generally recognize as lawful in the United States any divorce granted in a foreign court of competent jurisdiction having jurisdiction of the parties, provided such divorce is not inconsistent with our code of public morals.

If the law of Porto Rico requires no previous residence in the island on the part of the complainant for a given length of time in order to confer jurisdiction upon the courts, and if the allegations of the petition are sufficiently proved, in my judgment a decree of divorce should have been granted by the lower court.

Availing myself of this opportunity to again assure you of my great esteem,

I have the honor to be, very respectfully yours,

JAMES S. HARLAN.

The FISCAL OF THE SUPREME COURT.

MUNICIPAL BONDS—ARECIBO LOAN.

The act entitled "An act to authorize and regulate the issuance of bonds by the cities of Porto Rico," approved January 31, 1901, construed, and the word "city," as used in the act, held to be equivalent to and synonymous with the word "municipality."

There is no such corporate entity as a city in the insular system, and the phrases, "the city treasury," "the city council," etc., used in the act, were intended by the legislature to refer to the administrative machinery of a municipality.

Therefore held that the municipality of Arecibo may present a project for a municipal loan for the approval of the Executive Council.

OFFICE OF THE ATTORNEY-GENERAL,

October 22, 1901.

SIR: In the act of the legislative assembly entitled "An act to authorize and regulate the issuance of bonds by the cities of Porto Rico," authority is given, subject to the approval of the Executive Council, to "any city" having a population of more

than 10,000, to borrow money in an amount not exceeding seven per cent of its "tax valuation," and to issue bonds therefor. And the alcalde of Arecibo in his communication to you of the 9th, requesting an interpretation of the word "city" in connection with a loan of \$80,000, which the municipality of Arecibo desires to make, expresses the opinion that it refers to and covers the municipal district, and is in fact equivalent to the word "municipality."

I am of the opinion that this is a correct interpretation of the act; that the word "city" was intended by the legislative assembly as equivalent in scope and meaning to the word "municipality;" that it is not used in a popular sense as descriptive of a limited urban territory, but has reference to a corporate entity having contractual capacity. For instance, the act provides that "no city . . . shall become indebted;" "all moneys borrowed by . . . any city;" "the council of any city;" "the city treasury;" "the mayor and the secretary of a city council," etc., etc. As there is no such corporate entity in Porto Rico as a "city," it would seem to be clear that the legislative assembly, in referring to a mayor, secretary, council, etc., of a "city," had in mind the administrative machinery of a municipality, and used the word "city" as equivalent to and synonymous with the word "municipality." It follows from this view of the act that the municipality of Arecibo, having a population by the census of 1899-1900 of more than 10,000, may properly prepare and submit a project for a municipal loan for the consideration and approval of the Executive Council.

Very respectfully yours,

JAMES S. HARLAN.

The SECRETARY.

MARRIAGE OF COUSINS—PARDONING POWER.

The right to waive the impediment of law and to permit the marriage of cousins does not rest in the Governor, but requires the joint concurrence of the Governor and the Executive Council.

The Governor may grant a pardon to one condemned to imprisonment for seducing his cousin, on condition that he shall marry her, but the action of the Executive Council is necessary before such a marriage may lawfully be contracted.

OFFICE OF THE ATTORNEY-GENERAL,

October 25, 1901.

SIR: I have the honor to acknowledge the receipt of your communication of the 23d, inviting my attention to the case of J——E——R——, lately convicted in the District Court of——at the suit of his cousin of the crime of “estupro,” and sentenced to imprisonment for a term of 20 months and 21 days, and to the payment of \$500 by way of damages to the complaining witness.

In reply to your inquiry whether or not a pardon issued by the Governor, upon condition that the prisoner should marry his cousin, would carry with it the right of the two persons to marry, I beg to say that upon a full consideration of this general question the judiciary committee, in its report of June 14 of this year, reached the conclusion that “a dispensation of marriage between first cousins can be granted only by the Executive Council acting with the approval of the Governor.” This interpretation of the law seems to require an answer in the negative to your question.

In the same report the judiciary committee, having been impressed by the fact that many applications by first cousins desiring to contract matrimony, for a waiver of the impediment of law, were based upon the statement that seduction had occurred, and having reason to believe that in some cases it had occurred, or was alleged simply to lay a foundation for the petition, expressed the opinion “that a breach of the moral law should not be accepted as a sufficient cause for waiving the impediment; that a wrongful act should not be accepted as a ground for a breach of the deliberate prescriptions of the law.” So far as I am advised, in no case has the Executive Council receded from this position. If an exception to the rule is now made, it may afford ground for a renewal of the belief that an immoral act is all that is necessary to procure the acquiescence of the government in such a marriage, although contrary to a well-considered public policy as expressed in the law. For this reason I suggest the propriety of considering the application for the pardon of the young man separately and apart from the question of his marriage to his cousin.

With reference to the question of pardon I call your attention to the fact that the offender is not accused of “violación,”

a phrase equivalent to our word "rape;" or of "rpto," which involves abduction from the home of the female; but of "estupro," which is best translated into English by the word "seduction," and carries with it the idea of the virginity of an unmarried woman and her acquiescence in the immoral act. The young people are of the same age—nineteen years. It is said however that in this country the mental as well as the physical development of young girls far exceeds that of boys of the same age. This is recognized in the law; and I call your attention especially to the fact that at nineteen years of age the young girl in question had passed one year beyond the period when by law she is permitted to enter into matrimony *without the consent of her parents*; while the young man has still another year to live before such a discretion is by law given to him. Under such circumstances it seems rather illogical that he should be held to criminal responsibility. Yet this is the law, and until modified it must be respected. But in view of these facts, and especially of the statement deliberately made by your correspondent, who seems to have carefully investigated the case, that this is "*un cas de chantage*," it seems to me that an imprisonment of three or four months would satisfy the ends of justice, and that the young man should have an opportunity of considering the question of marrying his cousin after he is out of prison, and not as a condition of his release from confinement.

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

FREEDOM OF RELIGION.

Members of all creeds may worship in accordance with the dictates of their own consciences unvexed by governmental interference so long as the general code of public morals is not infringed.

The church bell from time immemorial has been the traditional method of summoning worshippers to religious ceremonies. While their use may be subject to reasonable regulation the Governor is without power to prohibit the tolling of them.

October 16, 1901. Alcalde of Utuado forwards petition of

Francisco Figueroa, requesting that an order be issued closing the bell tower of the Catholic church, or prohibiting the tolling of the bells; the alcalde says that he informed Mr. Figueroa that he (alcalde) did not consider himself with power to grant this request, but that he would consult the Secretary of Porto Rico on the matter (which he now does), in order that the Secretary might decide this petition in the manner he should deem most proper.

[1st endorsement:] Secretary's office. Respectfully referred to the Attorney-General, for his opinion. ARTHUR E. CLARK, Chief Clerk, in charge.

[2d endorsement:] Office of the Attorney-General, *October 28, 1901*. Respectfully returned to the Chief Clerk, in charge of the Secretary's office.

While it is true, as stated on the enclosures, that there has been a separation between church and state in this island, it must not be forgotten that such separation necessarily involves the absolute freedom of religion and of religious worship. Members of all creeds may worship in accordance with the dictates of their own consciences unvexed by governmental interference so long as the general code of public morals is not infringed. The church bell from time immemorial has been the traditional method of announcing religious ceremonies to the public. Its use may doubtless be subjected to reasonable regulation; but the power to prohibit the tolling of church bells does not exist; nor, so far as I am advised, is it competent for the Governor or Secretary to issue any order in the premises.

JAMES S. HARLAN.

The SECRETARY.

REGISTRATION OF PLUMBERS—POWERS OF THE SUPERIOR
BOARD OF HEALTH.

Under article 14 of General Orders 102, series of 1899, the superior board of health is authorized to issue regulations in respect to plumbing, and to examine applicants for registration as plumbers touching their qualifications.

OFFICE OF THE ATTORNEY-GENERAL,

October 31, 1901.

SIR: I beg to acknowledge the receipt of the letter of the president of the superior board of health of yesterday, endorsed by you to me on the same date, asking whether the board has power under General Orders 102 of the series of 1899 to satisfy itself of the capacity of applicants for registration as plumbers by requiring them to pass an examination.

My understanding is that the present legal status of the superior board of health is based upon the authority of that military order. In article 14 of that enactment I find, among other duties delegated to the board, the duty of supervising "plumbing and the registration of plumbers." Under this section, I am of the opinion that the board is charged with the general supervision of plumbing, and that it has authority to issue regulations stating the requirements which it will insist upon. Under the phrase, "and registration of plumbers," the board not only has the power, but it is its duty, to ascertain whether persons presenting themselves for registration are in fact plumbers. The law permits plumbers only to be registered as plumbers. The board is therefore required to ascertain whether an applicant for registration is in fact a plumber. To that end it is therefore competent for the board to examine the applicant touching his qualifications.

Very respectfully yours,

JAMES S. HARLAN.

The COMMISSIONER OF THE INTERIOR.

INSULAR POLICE OF PORTO RICO.

The act entitled "An act creating and providing an insular police of Porto Rico," approved January 31, 1901, examined, and the respective powers of the Governor, chief of insular police and the insular police commission explained and distinguished.

OFFICE OF THE ATTORNEY-GENERAL,

November 1, 1901.

SIR: I have the honor to acknowledge the receipt of your com-

munication of October 31, in which you invite my attention to the act entitled "An act creating and providing for an insular police of Porto Rico;" and, after observing that there seems to be some doubt in the mind of the insular police commission concerning the extent of their powers as distinguished from the powers of the chief of the insular police and of the Governor, you request an examination of the act and some expression of my opinion as to its meaning.

The importance of the question and the necessity of making a careful study of the act have made it impossible until to-day to respond to your inquiry.

Upon reading the act it becomes clear that the insular police force is a quasi military organization altogether different in character to the municipal police of the island. Unlike the municipal police, the members of the insular body, instead of being *employed* like other municipal officials, and being subject to dismissal as they formerly were at the will of the alcalde, and now, under a general order, at the will of the municipal council, are *enlisted* like soldiers; and, except for physical disability or conviction for crime, may be dismissed only upon the sentence of a court-martial upon charges regularly formulated and supported by sufficient testimony to warrant a finding against the accused.

Moreover the numerical strength of the insular police and the large territory over which its jurisdiction extends emphasize the necessity of governing the body, to some extent at least, after the manner of a military force. These facts also suggest the necessity of a division in the government of the organization, between the powers that are military in character and those that are purely administrative. It is not surprising therefore to find in the act in question, that these powers are distributed with exactness between the commanding officer of the force and the administrative commission which is created in the act.

This provision of the act is:

Section 4. *The control of the insular police is hereby vested in the commanding officer thereof, subject to the direction of the Governor, and the supervision of administrative detail respecting said force is vested in the insular police commission herein provided for.*

Language so definite and clear as this must have a definite meaning. The "*control of the insular police*" is delegated to

its commanding officer subject to the direction of the Governor as the commander-in-chief. On the other hand, the "*supervision of administrative detail*" is vested in the insular police commission. The two functions are thus placed in marked opposition to one another. So sharply indeed is the line drawn that it would seem to be clear that the police commission on the one hand may not participate in the duties delegated to the commanding officer; nor, on the other hand, may the commanding officer, as such, participate in the duties which are delegated to the commission.

If section 4 ended after the word "Governor," and read "the control of the insular police is hereby vested in the commanding officer thereof subject to the direction of the Governor," it would be difficult to deny to the clause an all-comprehensive meaning. For the word "control" conveys in itself the idea of complete domination and is synonymous with "rule," "manage," "govern." The section if so drawn would carry the authority of the commanding officer not only to the duties that are military in character, but to those that are merely administrative as well. His power would be modified only by such directions as the Governor might give. But the section does not stop at that point; it continues, and provides that "the supervision of administrative detail respecting said force is vested in the insular police commission herein provided for." The effect of this language is no greater than its words imply. It withdraws from the control of the commanding officer and from the Governor that portion of their control which has to do with administrative detail. It remains therefore only to ascertain what is the meaning of the phrase "supervision of administrative detail."

No definition, interpretation or construction can be stronger or more effective than a statutory definition, interpretation or construction. By this I mean a definition, interpretation or construction contained in the very act in which the doubtful word or phrase is used. Such a statutory interpretation of the phrase "the supervision of administrative detail" will be found in the act in question. Following section 4, in which that phrase appears, is another section, establishing the manner in which the commission is to be appointed and constituted. Then follows in various sections the enumeration of the duties of that body as follows:

Section 6 (a). To establish rules and regulations and to prescribe rigid physical and moral qualifications for enlistment.

(b). To publish the rules when approved by the Governor as the official rules of the insular police commission.

Section 7. To make rules and regulations concerning court-martial.

Section 8 (a). To examine all applicants for enlistment and appoint all privates according to their respective merits.

(b). No person enlisted as a private shall be removed by the commission except upon the expiration of his term of enlistment, or for physical incompetency, or in consequence of court-martial or conviction by a civil court for a crime.

Section 9. To forward to the Governor a list based upon competitive examination for non-commissioned officers.

Section 11. With the approval of the Governor to fix the compensation of officers and privates in the force.

Section 12. To determine, with the approval of the Governor, the strength and number of the force.

Section 13. To authorize all necessary expenditures and approve the vouchers therefor.

I cannot doubt that the enumeration of these duties is the legislative interpretation or meaning of "the supervision of administrative detail" granted to the commission. It is doubtless true that other powers and duties of an administrative nature are implied from and are incidental to those enumerated. In addition to those duties it also rests with the commission "to so distribute the insular police over the island as to give police protection to as many cities and pueblos as may be practical, consistent always with efficiency and the best management of the force pursuant to the provisions of this law;" from which I infer that the commission may determine the strength of the respective posts of the insular police.

There is not however in this enumeration any grant of power that is in conflict with the military control delegated to the commander of the force. In express terms this control is subject to the direction of the Governor. This being true it would seem to be quite illogical to hold that when the control has been brought under the direction of the Governor, who is the highest authority in the island, it should also be subjected to supervision by the commission. Such supervision would turn the command-

ing officer into a mere clerk of the commission and would subject the direction delegated to the Governor to correction by the commission. I am not able to reach the conclusion that this was the purpose of the act.

I am of the opinion therefore that the control of the insular police, vested by law in the commanding officer thereof, gives to him exclusive authority, subject only to the direction of the Governor, over the daily movements of the force and the officers in command of its companies or divisions; that he may assign particular men and particular officers to particular posts of duty as established by the commission; that he may send reinforcements or special details from one place to another, etc., etc. In other words, that the control delegated to the commanding officer embraces the broad military powers over the insular police that are commonly exercised by a military officer in the field over the forces under his command; and that there is no modification of this power, except that it must be exercised by the chief of police subject to the direction of the Governor as the commander-in-chief. It is clear however that in addition to the duties above enumerated the commission may control the strength of each post, and, with the approval of the Governor, the numerical strength of the whole force.

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

LETTERS PATENT.

The insular government has no power to issue letters patent under the former Spanish law.

The issuing of letters patent rests in the exclusive control of the federal government.

OFFICE OF THE ATTORNEY-GENERAL,

November 7, 1901.

SIR: The questions propounded in your communication of the 5th in relation to the registration in Porto Rico of letters patent granted elsewhere, and of the power of the insular government to issue letters patent, have on two occasions been the

subject of informal consideration and report by this department, of which copies are handed you herewith.

The conclusions then reached I am inclined now to adhere to; in fact it seems to me to be clear that this government has no power to issue letters patent when applied for here. That is a power resting in the exclusive control of the federal government. If you deem it necessary I shall be glad to make a more extended examination of the question, but I doubt not that you will concur in the conclusion reached, although very informally stated on the enclosed copies.

For your information I beg to say that on July 17 I had occasion to consider the question of registering trade-marks, and to address to your department a report embodying my views thereon.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

MONEYS DUE TO PUBLIC EMPLOYEES AND OTHER PUBLIC CREDITORS.

There is no authority in law for the payment of any portion of any sum due to a public creditor, whether by way of salary or for work done or materials furnished, to any person other than such public creditor.

OFFICE OF THE ATTORNEY-GENERAL,

November 16, 1901.

SIR: I have the honor to return herewith the draft of the endorsement which you propose to make to the Commissioner of the Interior, in reference to steps taken by the District Court of San Juan, and by the United States District Court, to secure the payment to persons other than the public creditor of the whole or a portion of the funds due to the said public creditor for work done on the Columbus monument at Aguadilla.

I have made a careful study of your endorsement. Permit me to say that it is a most admirable and clear statement of the law regulating such matters in the United States, and I agree with it in all particulars.

Although, in a recent communication to the Commissioner of

the Interior, I had taken a position to some extent contrary to the opinion expressed by you, I am convinced upon further examination of the matter, that your conclusion is correct and must be held to be the law in Porto Rico. It is certain that under paragraph 7 of General Orders 156, series of 1899, vouchers must be receipted by the public creditor to whom moneys are due. The only modification that I can see of the severity of the rule is that the legal representative of the public creditor, by which I mean the executor or administrator in case of his death, or a receiver in equity or assignee in case of bankruptcy, or his agent or attorney duly appointed for that purpose in writing, etc., may sign such vouchers for the public creditor in their representative capacity. It is a necessary principle underlying all of our jurisprudence that legal acts that may be performed by a person *sui juris* may be performed by his administrator or executor, or by a receiver or assignee duly appointed by a competent court or by his attorney-in-fact. In such cases the person is either actually dead or is in law deemed *civiliter mortuus*, and the legal representative or attorney may undoubtedly act.

I am of the opinion that article 1449 of the law of civil procedure, as modified by royal decree of June 28, 1895, is not in force and that there is no authority to pay one-fifth, or to pay any portion of any sum due to a public creditor, whether by way of salary or for work done or materials furnished, to any person other than such public creditor.

Very respectfully,

JAMES S. HARLAN.

The AUDITOR.

**MUNICIPALITIES—JURISDICTION OF THE SECRETARY AND THE
TREASURER OVER MUNICIPAL ACTS.**

A resolution amending a municipal budget having been adopted at a special meeting of a municipal council held in pursuance of a notice or summons, in which no mention was made of the budget or of any purpose to amend it, *held*, that the order of the alcalde suspending its execution was in exact accordance with law, and should be sustained by the secretary.

A law requiring notice to members of municipal councils of matters to be considered at special meetings ought to be upheld as a sound principle of municipal procedure.

The order of the Treasurer of Porto Rico repealing or setting aside the order of the alcalde suspending the resolution in question, was beyond the jurisdiction of the Treasurer.

The order of suspension does not involve the adequacy or inadequacy of the fiscal measures adopted by the municipality, but only the validity of the procedure by which the municipal council undertook to accomplish certain results.

It was competent for the Treasurer to disapprove the budget as first adopted, but not otherwise to intervene in the premises.

In case of a conflict of jurisdiction between two departments of the government in relation to municipal matters, the final resolution on the questions involved should come from the Governor as the superior chief of municipal councils.

OFFICE OF THE ATTORNEY-GENERAL,

November 19, 1901.

SIR: I beg to acknowledge the receipt of your communication of the 9th, in which, after stating that some question of jurisdiction seems to have arisen between your department and the treasury in connection with the adjustment of a controversy between the alcalde of Cabo Rojo and the municipal council in relation to certain municipal matters, you state the facts as follows:

That on June 25, being one of the days fixed under article 59 of the municipal law, for a regular or ordinary meeting of the council of that municipality, such a meeting was held and a resolution adopted establishing the municipal budget for the present fiscal year. That the next ordinary meeting of the municipal council should have occurred on July 3, but no meeting was held; that in accordance with the provisions of article 109 of the same law, a meeting was held on July 5;

that on this occasion certain amendments were proposed to the budget theretofore adopted, and, against the objection and protest not only of the alcalde, but of several members of the municipal council, were adopted; that in the summons for said meeting neither the budget itself nor the question of amending it was mentioned as a subject to be considered. That the alcalde, believing this action of the council to be in violation of article 108 of the municipal law, suspended the operation of the resolution by which the amendments were adopted, and reported the matter, together with the record, to your office for determination.

You further state that subsequently the Treasurer of Porto Rico, having requested the files from your office, assumed to determine the controversy, and notified the alcalde that the suspension by him of the amendatory resolution of July 5 was repealed, and ordered the budget to be made out in accordance with that resolution.

Upon this state of facts you ask my opinion upon two propositions as follows :

1. Under the circumstances herein detailed, is the question raised by the action of the alcalde one for determination by this department, or for the determination of the treasury department?

2. In case you should be of the opinion that the question is one to be determined by this department, then whether or not the action of the alcalde in suspending the resolution of July 5 should be sustained or overruled by this department as a matter of law based upon the articles of the municipal law referred to.

I have the honor to say in reply to the first inquiry that the controversy between the alcalde and the municipal council, so far as concerns the suspension by the former of the resolution of the latter of July 5, is one over which your department has sole jurisdiction. To your second inquiry my reply is that the action of the alcalde in suspending the resolution of July 5 was in exact accordance with the law and should be sustained by you.

In support of the conclusion reached as to your first inquiry it is to be observed that the question immediately before you for determination is not one relating to the adequacy or inadequacy of the fiscal measures adopted by the municipality; but to the general legal propriety or validity of the proceedings by which the municipal council undertook to accomplish certain

results. Having emphasized this distinction I beg now to refer you, as a sufficient basis in law for the proposition that the question is one to be resolved by the Secretary, to paragraph 4 of General Orders No. 102 of 1900, and to a royal decree of July 1, 1884. From the latter I have extracted the following:

If the acts of an *alcalde*, performed either as such or in the name of the corporation over which he presides, and in the representation and by order of the Treasurer for debts due to the latter, are in excess of his power, or if he assumes authority which he does not possess, or abuses his own, there shall not belong in any manner to the delegation of the Treasurer, the cognizance of them in either of the two cases, as there is involved an authority for a corporation of the civil order dependent upon other administrative superiors to whom it belongs to confirm or rebuke the *alcalde's* acts, as well as to punish administratively the acts in excess of his jurisdiction, or the faults which he may have committed in the exercise of his charge, according to the provincial and municipal laws and sound principles of administrative law.

In support of my reply to your second inquiry, I beg to refer you to article 59 of the municipal law, wherein a method is provided for fixing the dates of ordinary sessions of municipal councils, at least one of which must be held each week. The ordinary meeting having failed on July 3 it was held on July 5, in exact accordance with article 109. It did not however lose its character as an ordinary session. But whether an ordinary or an extraordinary session makes no difference in the present case; for, if an extraordinary session, under article 107 the business to be transacted should have appeared in the summons; and under article 108, if an ordinary session, any business transacted which is not mentioned in the summons, or any resolutions adopted in relation to any such business, is null and void. And as the proposed amendments to the budget of June 25 were not mentioned in the summons as subjects to be considered and acted upon at the session held on July 5, it follows that the amendatory resolution adopted on the latter date is not effective.

It may be true that the budget of June 25 was in need of amendment in order that it might conform to law, or for some other reason; but we are concerned now with a question of proper procedure, and the steps taken being contrary to the express terms of the law have no validity. It was therefore the duty of the *alcalde* to suspend the resolution of the latter

date. This duty devolves upon him under paragraph 2 of article 120 and paragraph 2 of article 180 of the municipal law. And having taken that action he should be sustained in it by the Secretary.

If the Treasurer desires to intervene in the matter in order that the budget of June 25 may be amplified or modified or otherwise amended, he must exercise his powers in the premises through another procedure. As I understand the practice he is charged in General Orders 102 of 1900 with the duty, in connection with the financial affairs of municipalities, of approving or disapproving municipal budgets as adopted by the councils, and by way of advice to guide the councils in such matters. If he does not approve of the budget of June 25 his recourse is to disapprove it. But it is not competent for him to repeal or set aside the action of the mayor in suspending a resolution adopted by the council without authority of law. It was not competent for him, in order to secure proper fiscal measures for Cabo Rojo, to base any action upon illegal proceedings. A law requiring special notice of matters to be considered at special meetings is of utility in the orderly conduct of municipal legislation, and is a familiar practice elsewhere. It ought not, in my judgment, to be set aside in order to meet the exigencies of a particular case, but on the contrary ought in every case to be upheld as a sound principle of municipal procedure.

I desire in conclusion to invite your attention to article 187 of the municipal law, which makes the Governor the superior chief of the municipal councils. There is a lack of co-ordination between this article and the general orders above referred to, which imposes duties in these general respects upon the Secretary; but it will not be necessary at this time to enter upon any discussion of the two laws. I refer now to the former more especially, because in this case the conflict is between two departments, and for that reason the final resolution in relation to it should perhaps come from the Governor, and in his absence from you as the Acting Governor, rather than from you as the Secretary.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

PUNISHMENT FOR CONTEMPTS—INHERENT POWERS OF COURTS.

The judiciary act of 1789 gave to the courts of the United States ample power to punish for contempts; but the act of Congress of March 2, 1831, limited this power to cases of misbehavior occurring in the presence of the court or so near thereto as to obstruct the administration of justice. Since that act was passed those courts have been without power to protect either themselves or the parties litigant before them from libel by the press.

The common law of England does not extend to Porto Rico, and it cannot be said therefore that the *common law* power of summary punishment inheres in the Supreme Court.

As the law of civil procedure in the chapter relating to disciplinary correction defines the powers of the courts in relation to summary punishment, it cannot be said that other and further powers are inherent.

OFFICE OF THE ATTORNEY-GENERAL,

November 21, 1901.

SIR: I have not had time to investigate fully the question of the inherent power of courts to punish for contempt, and in fact the law library of this department is so limited as to make it impossible to do this adequately. I have however gone into the matter far enough to enable me to make some suggestions.

The power of the courts of England to protect themselves, their officials, litigants and lawyers engaged before them, as well as to enforce obedience and prevent obstruction to their processes, seems to be quite extensive. In a note of a case which I have before me it appears that during the progress of a certain trial the court issued an order prohibiting the publication by the newspapers of any of the proceedings until the trial had been concluded. The newspapers disregarded this order, and the courts held this to be a contempt punishable by fine and imprisonment. Instances of this nature in the courts of England might be multiplied; but they are all based upon the common law power in the courts to protect themselves and the administration of justice. This power is spoken of in the books and decisions as an "inherent power."

So far as the federal courts are concerned, ample powers existed under the judiciary act, passed by the Congress in 1789, which created and for nearly a hundred years limited and defined the jurisdiction of the courts of the United States. In

section 17 of that act the courts were given the power to punish contempts by fine or imprisonment, in their discretion. Although I have not been able fully to examine the cases arising under that act, I doubt not that the power thus given was co-extensive with the power of summary punishment as it existed at common law ; and that under it the courts of the United States were able to protect their dignity and authority even against offenses committed out of their presence. But on March 2, 1831, Congress limited this power to cases of misbehavior occurring *in the presence of the court*, or so near thereto as to obstruct the administration of justice.

In *Ex parte Poulson*, 19 Fed. Cases 11350 ; s. c., 15 Hazard Pa. Reg. 380, the editor of a newspaper was cited before the Circuit Court of the United States for the Eastern District of Pennsylvania for contempt in publishing a libelous article against the plaintiff pending the trial of his case. The learned judge felt bound to deny the motion in consequence of the limitation in the act of Congress above referred to, because the offense was not committed in the presence of the court. In fact it has been said in relation to that act of Congress that it has withdrawn from the courts of the United States the common law power to protect parties before the court as well as the courts themselves against libel of the press, however atrocious, and although published and circulated pending the trial of the case.

The state of New York has followed that act of Congress, although it is also provided in that state that the publishing of a false or grossly inaccurate report of the proceedings of a court may be punished as a contempt. In Pennsylvania, on the other hand, it is specially provided by statute that no publication out of court respecting the conduct of the court shall expose the party to summary punishment, the only remedy being by indictment or by civil action.

It is possible that upon a full examination of the reports of the several states cases might be found where summary punishment has been imposed upon editors of newspapers. But I am unable definitely to recall any such case. The law in all the states provides of course an adequate remedy for such offenses by indictment for libel, etc.

But the particular question that we spoke of the other day

was whether it could be held that the common law power of punishment for contempt was inherent in the Supreme Court of Porto Rico. I find it difficult to arrive at that conclusion. The common law of England does not of course extend to Porto Rico, and we cannot therefore say that the *common law* power of summary punishment inheres in your court. If therefore inherent powers are to be exercised, it seems to me that they must arise from the Spanish system. If you will look into the law of civil procedure in the chapter relating to disciplinary correction you will find some provisions giving the courts power of summary punishment in cases of misdemeanors in the presence of the court. As the question of summary punishment has thus been made the subject of legislation and the powers of the court defined, I doubt whether other and further powers may be said to be inherent. For these reasons it seems to me that the Supreme Court in this matter¹ has no other remedy than that provided by the penal code.

Very respectfully,

JAMES S. HARLAN.

Mr. JUSTICE McLEARY.

FEDERAL PRISONERS—GOOD TIME ALLOWANCE.

Sections 5539 and 5544 of the Revised Statutes of the United States, providing that federal prisoners confined in the jails and penitentiaries "of any state or territory" shall be entitled to the same rule of time credits for good behavior that is applied to other prisoners, are fairly to be interpreted as applying to federal prisoners in the penal institutions of Porto Rico, although Porto Rico is neither a state nor an organized territory.

OFFICE OF THE ATTORNEY-GENERAL,

November 27, 1901.

Respectfully returned to the Acting Governor of Porto Rico.

This matter comes before me on the request of Mr. Dexter, the attorney of the prisoner, that the prisoner be granted the usual allowance of time for good conduct. I am informed by the director of prisons under date of November 23 that the con-

¹ The matter referred to was a gross newspaper attack upon the court in connection with one of its decisions.

84 *Supreme Court—Marshal may Execute its Process.*

duct of the prisoner has been excellent, and that according to the prison rules he will be entitled on the 1st of December to thirty days' time.

Under section 5539 of the Revised Statutes of the United States it is provided that any criminal convicted of offenses against the United States and imprisoned in the penitentiary of any state or territory shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such penitentiary is situated.

Under section 5544 it is provided that all prisoners now or hereafter confined in the jails or penitentiaries of any state for offenses against the United States shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary.

While the latter section is limited to penitentiaries in "any state," I am of the opinion that taken in connection with the former section it is to be fairly inferred that all federal prisoners wherever confined are entitled to the benefit of such credits for good behavior as are given to prisoners held under sentences of courts other than federal courts.

I recommend that the director of prisons be so advised as to this particular case, and as a general rule to be applied in favor of federal prisoners at all times.

JAMES S. HARLAN.

The GOVERNOR.

SUPREME COURT—MARSHAL MAY EXECUTE ITS PROCESS.

The only purpose to be ascribed to the action of Congress in providing a marshal for the Supreme Court is that it was intended thus to enable the court to execute and enforce its own judgments and decrees.

OFFICE OF THE ATTORNEY-GENERAL,

December 7, 1901.

SIR: I have the honor to acknowledge the receipt of your communication of the 5th, and to return herewith the record in the criminal proceedings against Pascasio Fajardo Cardona, municipal judge of Mayaguez, on the last page of which is a request for an expression of my opinion on the competency of

the marshal of the Supreme Court to enforce the sentence pronounced in that court against the said municipal judge.

In reply to this request I call your attention to the fact that in that case, as in some others that come before it, your court had original jurisdiction; and one of the chief purposes, if not the only purpose, that may be ascribed to the action of the Congress of the United States in providing the Supreme Court of Porto Rico with a marshal, is that it was intended thus to enable the court to execute and enforce its own judgments and decrees, particularly in cases of such original jurisdiction. Moreover, under the terms of article 985 of the code of criminal procedure, it seems to be a proposition that cannot reasonably be doubted that the execution of its own sentences, now that an executing officer has been provided by law, is lodged in your tribunal just as it is lodged in the Supreme Court of the United States.

Very respectfully,

JAMES S. HARLAN.

The CHIEF JUSTICE.

OFFICIAL MISCONDUCT—DISMISSAL OF FISCAL.

The Supreme Court, upon the testimony adduced before it, having found that the charges preferred against a fiscal were not proved, nevertheless found him guilty of reprehensible conduct of such character as to require that it be called to the attention of the Attorney-General with a view to his administrative punishment. His dismissal from the public service is therefore recommended.

OFFICE OF THE ATTORNEY-GENERAL,

December 13, 1901.

SIR: On the 25th of September last the attention of the Governor of Porto Rico was called to certain charges affecting the personal integrity and official character of Moreno Calderon, then fiscal of the District Court of Ponce, in connection with his conduct of certain public and official duties of grave importance. The evidence submitted at that time by the Acting Attorney-General to the Governor was of such character that it was deemed necessary in the public interest to suspend the fiscal from his office until an administrative examination and

resolution in relation to the charges might be had, or until the suspension was revoked by further executive order.

Subsequently on the 18th of October the matter was presented to the Supreme Court of Porto Rico in the form of provisional conclusions formulated by this department against the accused. An oral trial being had and a conclusion having been reached and announced, the court this morning filed its formal judgment.

The court finds that the charges of bribery and prevarication are not sufficiently proved ; the accused is therefore acquitted and the judicial order of suspension heretofore entered by the court revoked. The court nevertheless finds him guilty of reprehensible conduct of such character that it has deemed it proper to call the matter to the official attention of this department with a view to his administrative punishment.

I shall not endeavor either to characterize the conduct of the accused, to which reference is made by the Supreme Court in its sentence, or to state any of the facts proved, other than this : that while an officer of justice he purposely and with deliberation prepared and solemnly made oath to an untruthful statement, which he filed in this department for the purpose of being transmitted, and which was transmitted as a part of his defense to the Supreme Court of Porto Rico. It will be sufficient to say that in my judgment, and in this I doubt not that the good people of this island fully concur, Moreno Calderon has demonstrated his unfitness longer to represent the people of Porto Rico in an official capacity. It is my duty therefore to recommend that the suspension ordered by the Governor on September 25 be made permanent, and that Moreno Calderon be dismissed from the public service as of that date.¹

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN.

The ACTING GOVERNOR.

¹ The recommendation having been affirmed was carried into effect.

FISCALS NOT TO PRACTICE AS NOTARIES.

The act relating to notarial practice gives the right to act as notaries only to those lawyers that are "in the exercise of their profession before the insular courts." As fiscals of the district courts are not exercising their profession, within the meaning of that law, but are acting only in their official capacity, they are excluded from acting as notaries.

Under article 427 of the Compilation of Organic Provisions Relating to the Administration of Justice, fiscals are expressly prohibited from practicing law. This is an expression of public policy which necessarily excludes them also from practicing as notaries.

Persons enjoying salaries in the government service ought not to be permitted by engaging in practice to diminish the professional rewards and opportunities of others not in official positions.

[Endorsement.] OFFICE OF THE ATTORNEY-GENERAL.
December 16, 1901. Respectfully returned to the ACTING GOVERNOR.

It is clear that a fiscal may not with propriety act as a notary. The Act entitled "An Act relating to notarial practice in Porto Rico," gives the right to act as notaries only to those lawyers that are "in the exercise of their profession before the insular courts." It is to be fairly inferred from this language that the privilege is not open to fiscals. They are not exercising their profession, in the sense of that Act; but, on the contrary, are acting in an official capacity which makes the exercise by them of the profession of notary incompatible.

Moreover, in article 427 of the compilation of organic provisions relating to the administration of justice, translated by the War Department, July 18, 1899, it is expressly provided that persons appointed to offices in the department of public prosecution shall not practice law. This is an expression of public policy in relation to fiscals which, in my judgment, would necessarily exclude the fiscal from practicing as a notary.

In addition to this, I am strongly of the opinion that the government should not permit those who are enjoying good salaries to engage in practice and thus to diminish the professional rewards and opportunities of lawyers who are not in official position.

JAMES S. HARLAN.

POLICE JURISDICTION OF ALCALDES ABOLISHED.

Under the prior law the alcaldes of the island besides being administrative officers were also charged with the enforcement of police regulations and municipal ordinances. The intent however of the act of the first legislative assembly creating police courts was to withdraw from the alcaldes all such duties and to leave them with administrative powers only. The police judge of Gurabo was therefore within his jurisdiction in decreeing a forfeiture of bread of short weight under circular 156 of March 7, 1900.

December 6, 1901. Alcalde of Gurabo, files complaint against the local police judge for abrogating powers given to Alcaldes in Circular No. 156 establishing the weight of loaves of bread, published in Official Gazette, No. 55.

[1st endorsement:] Secretary's Office, December 17, 1901.

Respectfully referred to the Attorney-General for proper action. ARTHUR E. PARKE, Acting Secretary.

[2d endorsement:] Office of Attorney-General, *December 21, 1901*. Respectfully returned to the Secretary of Porto Rico, with the suggestion that action on this matter should be taken by the Secretary and that it should be a dismissal of the alcalde's complaint on the ground that the police judge has acted with propriety in the premises.

The matter stands in this wise: Until the passage of the police court act to be found on page 38 of the session laws of the first Legislative Assembly of Porto Rico, the several alcaldes of the island under authority of law were charged with jurisdiction over offenses against police regulations and municipal ordinances. Besides being administrative officers they were also judicial officers. But it was clearly the intention of the legislature in passing the act in question to withdraw from the alcaldes all judicial functions and to leave them only the ministerial powers theretofore enjoyed by them. Although the act refers only to General Orders 195, it is apparent that the jurisdiction of the police courts was intended to cover all matters theretofore cognizable by alcaldes sitting as police magistrates. This department has so ruled on a number of occasions and with respect to a number of general orders not mentioned in the act in question. This conclusion has been generally acquiesced in and alcaldes are performing no judicial functions so far as this department is advised.

For these reasons, which I need not amplify, I am of the opinion that the jurisdiction of police judges embraces the subject matter of Circular 156 of March 7, 1900, and that the police judge of Gurabo acted within his jurisdiction in respect of the matters referred to on the within complaint.

The distribution of the forfeited bread from the door of the court is not however a literal compliance with the circular, which requires such distribution to be made among hospitals, charitable institutions and jails. And the police judge should have followed the exact letter of the circular if there is in that municipality either a hospital, a charitable institution, or a jail. I have so advised him for his information and guidance in future cases of this kind.

JAMES S. HARLAN.

FREEDOM OF THE PRESS—CIVIL AND CRIMINAL RESPONSIBILITY OF EDITORS AND PUBLISHERS.

Freedom of the press is an essential characteristic of a free government, and the insular administration will not tolerate the suppression of a newspaper by local officials except for extraordinary reasons. Publishers are not above the law, but they should be held responsible by the courts as others are held for like offenses, and not by the suppressing of their newspapers.

OFFICE OF THE ATTORNEY-GENERAL,

December 21, 1901.

SIR: I have your communication of the 18th, enclosing a copy of the "Voz de la Patria," containing the publication¹ that was the occasion of the seizure under your orders of its edition of the 17th.

My telegram requiring you to return the edition was intended as the assertion of a vital principle in free government, and one that is of importance in Porto Rico as well as in the United States. The freedom of the press is an essential characteristic of a free government. Newspapers perform a function to some extent of a public character, and if I understand correctly the attitude of this government in such matters, it will

¹ The article in question was a severe criticism of the action of the court in a particular case.

in no case support the suppression of a newspaper or of an edition of a newspaper unless for some extraordinary reason it is deemed by the central government a necessary thing to do. Any other course would in my judgment be harmful to the public interest.

I do not mean by anything here said to indicate that publishers of newspapers are above the law or that they are not to be punished for offenses against the law as freely as others. On the contrary, editors and publishers of newspapers should be held responsible for libel and other offenses, and should be punished with the same severity with which courts punish others for similar offenses. And without attempting to go into the merits of this particular case, I wish to say that if a crime has been committed by the editor or publisher of the newspaper in question he should be punished, and this office will co-operate in the effort to secure the execution of the law.

Very respectfully,

JAMES S. HARLAN.

The MUNICIPAL JUDGE OF MAYAGUEZ.

HARBOR RULES AND REGULATIONS.

The harbor rules and regulations established under general military orders and prior Spanish laws are still in force, so far as the latter do not conflict with the former; but new legislation should be had to meet the different conditions now existing.

OFFICE OF THE ATTORNEY-GENERAL,

December 21, 1901.

SIR: I have the honor now to acknowledge the receipt of your communication of November 22 enclosing a letter from the Governor in relation to the appointment of a captain of the port, together with two letters from the latter official and a copy of the rules and regulations proposed for the ports of the island.

You state that you take it for granted that the insular government has the right to enforce the rules and regulations established by General Orders 133, and that inasmuch as this order does not specifically abolish the rules and regulations in force

prior to its promulgation, you lean to the conviction that it may also enforce such sections of the old rules and regulations as are not in conflict with the provisions of the general order named; and you ask my opinion upon the question whether the rules and regulations embodied in the document marked C, herewith enclosed, prepared by the captain of the port, may be adopted without reference to their co-ordination with the old regulations or those prescribed by the general order in question.

In reply I beg to say that I am of the opinion that the rules and regulations established by the general order in question may now be enforced by the insular government, with the exception of those parts of articles 32, 33 and 34, which contemplate future action by a board no longer in existence. Under article 31 the captain of the port will of course pay over all fines collected to the Treasurer of Porto Rico. Article 21 presents some difficulties, as the United States Provisional Court is no longer in existence. I am also of the opinion that the old rules and regulations, so far as they do not conflict with the general order in question, may be considered as still in force, particularly those contained in the royal order of April 10, 1896.

After a somewhat careful examination I am unable to find any authority in law for the promulgation by the captain of the port of a new set of rules and regulations such as are contained in the document marked C. In my judgment the whole matter may well be made the subject of careful consideration by your department with a view to new legislation at the approaching session of the legislative assembly.¹ The execution of the rules and regulations as they now stand is not free from difficulty.

Very respectfully,

JAMES S. HARLAN.

The COMMISSIONER OF THE INTERIOR.

MUNICIPALITIES—JURISDICTION OF THE SECRETARY.

A, having purchased contiguous properties through which there was a path-way connecting a public highway with a river running through the estates so purchased, proceeded to close it to the public on the theory that

¹ The whole subject of the harbor rules and regulations was covered by appropriate legislation at the session of January-February, 1902.

it was a private easement pertaining to the properties purchased, and that it was merged in his general title when he acquired the several properties in question. The wire fence erected by him across the pathway was removed by order of the alcalde. Upon the suggestion that the dispute between the purchaser and the municipality was a matter for adjustment in the courts, *Held* that the question is one to be resolved by the Secretary subject to final disposition by the Governor.

Control over municipal councils and over municipal acts is lodged by law in the Governor of Porto Rico as their hierarchical superior, and is to be exercised by and through the good offices of the Secretary.

This jurisdiction is established by law, and in many cases, should the exercise of it be declined, the petitioners would be left without other recourse. In this formative period in the history of the island the tendency should be to accept and enlarge the jurisdiction rather than to decline and diminish it. By this means disputed rights may be investigated and a just solution reached without the expense and delay necessarily incident to a judicial determination.

The exercise of this administrative power does not result in ousting the courts of jurisdiction, for the law expressly provides that an appeal may be taken to the courts from any conclusion reached by an administrative officer.

OFFICE OF THE ATTORNEY-GENERAL,

December 26, 1901.

SIR: I have the honor to acknowledge the receipt of your communication of December 4, with which you transmitted to me, with the accompanying papers, a complaint filed by the consul of France, relating to the forcible opening of a road or highway through certain property, the title to which is claimed by Mari Brothers, citizens of the Republic of France. After stating that the law clerk of your office is inclined to the opinion that the case is a proper one for determination by a competent court, you ask an expression of my own view of the matter under the circumstances disclosed upon the documents in question.

Briefly stated, the claim of the petitioners as disclosed upon this expediente, which seems for the most part to represent their side of the case only, is as follows: Mari Brothers recently acquired title to a number of contiguous properties, through which, at the time of the purchase, was a pathway, or at least the remnants of a pathway, connecting a public highway with a river running through the conjoined estates. Along this pathway there were, prior to the purchase, several different holdings on which residences had been erected by the former owners.

The pathway had been used by these owners as a means of access to the water, and, as claimed by the petitioners, as a private easement pertaining to their respective properties. All these several properties were subsequently acquired by the petitioners, and the easement, as is asserted, was therefore merged in the one joint title. In enclosing their new purchases the complainants erected a wire fence across the pathway. The path remained in that condition for some weeks and until the municipal council ordered the removal of the obstruction. The fence was then cut down by persons acting under the orders of the alcalde.

On the part of the municipality it is stated that the path has been used by the general public for twenty years or more without interruption or objection, and that it is therefore a town or rural road in which the public enjoys an easement of way by prescription.

I shall not endeavor to examine or place before you a further analysis of the testimony that has been submitted for your consideration. It will be sufficient for the present purposes to say that there is a serious conflict of statement. The issue is sharply defined as to whether the pathway was solely for the use of the former owners of the properties subsequently acquired by the petitioners, or whether it is a rural road to which the public title has ripened by prescription. The petitioners have furnished two maps of the premises. Assuming their correctness, it appears from one that there is a natural and sudden declivity in the topography, at the point of the alleged rural road, of such character as to indicate the improbability of its deliberate adoption by public authorities as a highway. The other map, if accurate, shows that in the immediate neighborhood there is already a public road giving access to the water, laid out by public authority, upon which public funds have doubtless been expended.

The memorandum prepared by the law clerk of the Secretary's office seems to proceed upon the theory that the case presents a question of ownership, and is therefore to be resolved by a competent court in accordance with a decision handed down by the Supreme Court at Madrid on July 7, 1891. I am not able to concur in this view, but am of the opinion that the

question is one to be resolved by the Secretary subject to the final resolution of the Governor.

The control over municipal councils and their acts, lodged by law in the Governor of Porto Rico as their hierarchical superior, is one of the most characteristic phases of municipal administration as established under the Spanish law. It is an administrative power that seems to be especially valuable in this formative period in the history of the island, and in your competent and skilful hands, while acting for the Governor, will produce beneficent results, not only to the municipalities but to those who are in controversy with them. By this means municipalities may act with promptness and vigor when public interests are involved, while disputed rights with private citizens may, in many cases, be investigated and a just solution reached without the expense and delay necessarily incident to a judicial determination. It is to be remembered also that in case the conclusion reached by you in any such case is not concurred in by the parties in interest, either of them, by appealing from it, may have the benefit of a judicial examination and investigation in a contentious administrative proceeding in the competent court. For these reasons I am of the opinion that, like a judicial tribunal, the tendency of your office should be to accept and enlarge rather than to decline and diminish its jurisdiction. This becomes particularly important in view of the fact that it is a jurisdiction established by law, and when the exercise of it is declined the petitioners in many cases would be left without other recourse.

I have had these reasons strongly in mind in reaching the conclusion that the dispute in question is one that must be resolved by the Governor through the good offices of the Secretary. And in arriving at this result I am not unmindful of the authority cited on the memorandum of your law clerk. This case however seems to present no question of disputed ownership as he states. The municipality will doubtless not deny the fact that the title to the soil is in the petitioners. At most the municipality claims only an easement of passage. And if such matters must be adjusted by the courts and not by administrative action, the result will work seriously against the public interests. If in law and in equity the right of the public of San German to use the pathway in question has been acquired by

prescription, the public convenience would be seriously impaired if the municipality, instead of appealing to the Governor of Porto Rico through you, as it properly ought to have done instead of taking the law into its own hands, should be compelled to submit the matter to the slow process of adjustment in a court of law. For this reason, if for no other, it is highly desirable that matters of this general nature shall be subject in the first instance to the administrative jurisdiction of the Governor. No hardship is involved in this resolution for the reason, as has been pointed out before, that an appeal from the conclusion reached by him may be taken to the courts. The general question involved on this expediente has been the subject of consideration in Madrid. And I am fortified in this view of the matter by a royal order of March 17, 1887, which seems to me to be of conclusive authority in this case. It is to be found on page 1 of Official Gazette No. 33, of March 17, 1887.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

CITIZENSHIP OF CHILDREN OF NATURALIZED CITIZENS.

The son of a foreign born person, who completes his naturalization while the son is under age and is residing in the United States, is himself a citizen of the United States.

December 27, 1901.

SIR: As I understood your statement of yesterday afternoon, your father came to this country while you were still under age, and before his death completed his naturalization as a citizen of the United States; and that after the completion of his naturalization, you attained your majority. Upon these facts, the question is easily solved.

Section 2172 of the Revised Statutes of the United States (2d ed. 1878) provides as follows:

The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any act on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.

96 *No Punishment for Refusal to Serve on School Board.*

If therefore your father completed his naturalization while you were under age and while you were residing in the United States, you are a citizen of the United States. There can be no doubt of this conclusion upon the facts as you state them. The case of *Boyd v. State of Nebraska*, 143 U. S. 135, seems to settle the point beyond any question.

Respectfully yours,
MR. WILLIAM WESTON BESSELL,
Lieut., Porto Rico Regiment,
San Juan,

JAMES S. HARLAN,

NO PUNISHMENT FOR REFUSAL TO SERVE ON SCHOOL BOARD.

Members-elect of school boards who refuse to serve cannot be punished under section 2 of the school laws, but their places may be filled by the district court upon nomination of the Commissioner of Education, and the old boards hold over until their successors are duly appointed and have qualified.

OFFICE OF THE ATTORNEY-GENERAL,
January 7, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of the 5th instant, in which you state that two members-elect of the new school board of Manati refuse to serve, and request the opinion of this office on the following points:

Whether the penalty for refusing to serve after having accepted the office, as prescribed in the school laws, section 2, page 27, can be collected under the revised code;

Whether, under the circumstances, the old board holds over until the appointment of new members to take the place of those refusing to serve;

Information as to the proper procedure to fill the places thus made vacant.

In my opinion the acceptance of an elective office is not complete until the officer-elect has duly qualified, and hence section 2, page 27, of the school laws is not applicable to the cases mentioned by you. In addition I would say that section 558 of the penal code prescribes that no act or omission commenced after twelve o'clock noon of the day on which the code took effect as a law (July 1, 1902,) is criminal or punishable, except

as prescribed or authorized by the code. That article, to my mind, repealed section 2 of the school laws above mentioned.

The failure on the part of a member-elect of the new school board to qualify within the time prescribed by law creates a vacancy in the office for the purposes of the appointment of another; but until that other is duly appointed and qualified the old members may hold over.

Section 8 of the act to establish a system of public schools in Porto Rico is still in force and prescribes that vacancies in the school boards shall be filled by appointment of the district court; such appointment shall be made upon nomination by the Commissioner of Education immediately upon the court being informed of such vacancy.

I therefore answer your questions by saying that in my opinion the penalty prescribed by section 2 of the school laws above mentioned cannot be collected under existing laws; that the old school board holds over until the appointment of new members to take the place of those refusing to serve, and that the appointments to fill vacancies are made by the district court upon your recommendation.

Very respectfully,

FRANK FEUILLE,

Acting Attorney-General.

THE COMMISSIONER OF EDUCATION.

SCHOOL TEACHERS—SALARY FOR SPECIAL SERVICES.

A school teacher like any other employee of the government may be required in an emergency to work overtime without extra compensation; but a permanent service extending beyond the customary hours cannot lawfully be required.

The language of the appropriation act, which provides that school principals shall be paid "not more than \$75.00 per month," was intended to cover their services during the customary school hours.

No objection may lawfully be made to the payment of additional compensation for permanent services at a night school to a principal who also teaches during the customary school hours of the day.

[1st endorsement:] Office of the Executive Council, December 20, 1901. Respectfully referred to the Attorney-General for his opinion as to whether or not the request of the Acting

Commissioner of Education may be granted. By direction of the Council. W. R. BENNETT, Acting Chief Clerk.

[2d endorsement:] Office of the Attorney-General, *January 9, 1902*. This is not an application on the part of the Acting Commissioner of Education for authority to increase the salary of a principal school teacher from \$75.00 to \$85.00 per month, but for authority to pay an additional sum of ten dollars a month to an individual employed as principal at \$75.00 a month, the addition to be in compensation for services not within the scope of his employment as a school principal.

Teaching school involves traditionally a limitation as to the hours of service. This limitation differs in different communities. In Porto Rico, by custom and in accordance with school regulations, schools open at about half-past eight in the morning, and after a noon recess close at four or half-past four in the afternoon. While it is undoubtedly true that a school teacher, like any other employee of the government, may be required in an emergency to work overtime without extra compensation, nevertheless I am of the opinion that a permanent service extending beyond the customary hours above named cannot lawfully be required of a school teacher. In other words, it would not be lawful, in my judgment, to require a principal who performs his duty during the day hours also to take up permanent service in night schools without extra compensation. I find no law requiring a school teacher permanently to perform services gratuitously which are not within the ordinary school teacher's contract. It would doubtless be a wise policy, if any other person could be found in the municipality in question, to install a separate teacher in the night school; but inasmuch as the exigencies of the case require the appointment in the night school of a principal of a day school, I see no reason in law why additional compensation may not be paid to him. The language of the appropriation act, which provides that principals shall be paid "not more than \$75.00 per month," was clearly intended to cover their services only during the customary school hours. This language will undoubtedly cover service on emergency work beyond those hours; but it is clear that the act was not intended also to include permanent service at a night school. JAMES S. HARLAN.

**COMPLAINTS AGAINST PUBLIC OFFICIALS—JURISDICTION OF
THE ATTORNEY-GENERAL.**

A school supervisor, who had inflicted corporal punishment upon a pupil in a school house, having been fined by a police judge for "assaulting and abusing a child," *Held*, that the proceeding, having been commenced without the knowledge or authority of the Attorney-General, was void from the beginning.

A court has no jurisdiction to entertain a complaint against a public official for any act arising out of the performance of his official duties, except upon charges formulated by or upon the authority of the Attorney-General.

OFFICE OF THE ATTORNEY-GENERAL,

January 21, 1902.

SIR: In connection with the application of the Acting Commissioner of Education for the pardon of William H. Armstrong, a supervisor of schools, I have the honor to advise you that on the 4th of January, in the police court of the cathedral district of San Juan, the case against Mr. Armstrong came on for trial upon a complaint filed by Don Ramon Falcon, president of the school board of that municipal district. The charge was that the defendant had assaulted and maltreated a boy named Manuel Rola, a pupil in the McKinley School.

From the sentence, which seems to state fairly the substance of the testimony adduced, and a copy of which I herewith enclose, it appears that the boy had previously been guilty of bad conduct in that school; and my investigations show that he had made trouble in other schools, and was generally considered a refractory pupil. It appears also that on the occasion in question his conduct was such as to require discipline. With this end in view he was required by Mr. Armstrong, not to submit to any corporal punishment, which seems not to have been intended at all, but, in order that an example might be made of him, to stand upon a box in the school-room. He refused to take that position, and the supervisor by taking hold of him compelled him to obey. The boy stepped from the box and was again put back by the supervisor. Again he left his position and again he was put back by Mr. Armstrong. Finally the boy seized some iron drinking cups from nearby and threatened the supervisor with them. All the witnesses agree to

this, and the boy himself says that he took hold of the iron cups "in his own defense." As a reason for assuming this attitude toward the school official he says that he knew the supervisor had "ill-treated other children, and that he did not propose to have him ill-treat him."

The result of this hostile attitude on the part of the boy was a scuffle, in which the cups were taken from him. The court says the supervisor shook him by the neck roughly; that a wound on his upper lip was noted at the trial, together with some rents in his garments, which the police judge says were caused by the supervisor.

There is no doubt, and all the witnesses so stated, that the boy at the time in question was not only disobedient, but in the open school-room addressed insulting words to the school official.

Upon this evidence the police judge reached the opinion that the boy should be "severely rebuked." He refers to the boy in the sentence as a "child," although the record before me shows that he was sixteen years of age. He classifies the conduct of the supervisor as "assaulting and abusing a child," and under paragraph 29 of General Orders 195 of 1899 fined him five dollars and costs, from which judgment, under the law, no appeal can be taken.

That paragraph of the general order named is the law under which street brawlers are punished; and its application to the official acts of the supervisor on the occasion in question is, in my judgment, an ill-considered judicial conclusion. Moreover the announcement by the police judge in the sentence that a school official in the fulfilment of his duties may expel a child from school but may never inflict corporal punishment, has no authority in law. On the contrary, the Department of Education has taken the position that corporal punishment may be inflicted in a proper case. And in the absence of a law forbidding it the question is one to be determined by the superior authorities and not by a police judge. The observations of the police judge in relation to that question are therefore simply the substitution of his judgment of propriety in such matters for the deliberate judgment of the Department of Education.

There is however another and a still more serious objection to the action of the police court in this case.

In paragraph 14 of General Orders 98 of 1899 the Solicitor-General, then the head of the Department of Justice, and whose duties, under General Orders 102 of 1900, have devolved upon the Attorney-General, was required to prosecute in all cases of official misconduct on the part, among others, of officers, secretaries, clerks, bailiffs and other employees "of the insular administrative departments." Since I assumed charge of this department no case against any person holding official position of the character above named has come on for trial without the intervention of the department. On the contrary, the activities of the department are frequently invoked in criminal proceedings against officials and employees in the several branches of government.

The case in question is a marked example of the propriety of such a provision of law. The police judge differs in opinion from the Department of Education, and punishes an official in accordance with his opinion. If such judicial reviews of official acts are to take place without the cognizance of the chief law officer of the government, confusion and demoralization of the public service will necessarily follow. We shall have one police judge taking one view of official acts and another taking another view. We may even expect officials acting under the direct orders of the government to be called to account in police courts, if such trials are to proceed without the intervention of that officer of government who is specially charged by law with the prosecution of delinquent officials.

It will not be necessary to enlarge upon this view of the case. It is sufficient to say that the proceeding against the supervisor had no authority in law and was void from the beginning, the court having no jurisdiction to entertain a denunciation against a public official for any act arising out of the performance of his official duties, except upon charges formulated by, or under the direction of, the Attorney-General.

I recommend therefore that the police judge be instructed to return to the Acting Commissioner of Education the amount of the fine which, upon my suggestion, was paid over to him pending the consideration of this application for a pardon.

Although it is not strictly within the terms of your reference to me of this matter, I nevertheless deem it my duty as an administrative officer to call your attention to a fact that has de-

veloped from my investigations of the record of the case. It is apparent that the supervisor had no intention, in the first instance, of chastising the pupil, but that he was forced into the necessity of physical compulsion by the extraordinary conduct of the boy, who, in the scuffle, tore off the supervisor's collar and tie. But what has attracted my attention most seriously is the fact that when the boy made a threat of physical violence toward the supervisor, the latter official, in the presence of the school children took off his coat as if preparing for a fight, and as if willing to enter into such a spectacle in the school-room and before the school children. It may be that the supervisor will be able to give a satisfactory explanation of this act; it may be that no other step on his part would have been effective with this boy. The picture however of an official of mature years, who takes off his coat in the presence of school children and puts himself in the position of entering into a physical altercation in a school-room with a young boy, is not an agreeable one, and in my judgment requires an explanation.

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN.

The Governor

MINING RIGHTS—CONVEYANCES BY THE GOVERNOR.

Under article 56 of the regulations of 1868 the Governor may issue titles to mining claims. Such deeds however should be executed in the name of The People of Porto Rico.

OFFICE OF THE ATTORNEY-GENERAL,

January 21, 1902.

SIR: On the 27th day of December last I had the honor to receive from you a communication enclosing two deeds to mining claims under the surface of private lands, forwarded to you by the Commissioner of the Interior for execution by you in your capacity as chief magistrate of the island, with the statement that you transmitted the documents to me in view of the fact that this department theretofore had suggested some doubt as to whether the Spanish law in relation to such transfers was still in force.

Under article 56 of the regulation of 1868 it is provided that :
"The title to mining claims . . . , should be issued by the governor (of provinces) within the period of fifteen days after the period of thirty days has expired without an appeal, to which paragraph 1 of article 37 of the law of mines refers, and that the title itself shall always be accompanied by one of the maps, which, for this purpose, shall be separated from the expediente and sealed with the seal of the government of the province."

Before the creation of this government and since its establishment it seems that the Governor of Porto Rico has been issuing deeds under the authority of the above-mentioned article. My attention however was attracted to the question by the language of section 13 of the organic act, which provides as follows: ". . . Minerals under the surface of private lands are hereby placed under the control of the government established by this act, to be administered for the benefit of The People of Porto Rico; and the legislative assembly hereby created shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable."

My first thought was that there was some indication in this language of the necessity of new legislation; but I now entertain a different view, and until new legislation is had I am of the opinion that the Governor may continue to convey these rights under the old law. As the former government however has now been succeeded by The People of Porto Rico, it seems to be more consistent to have The People of Porto Rico appear as the grantor in the deeds, by William H. Hunt, Governor. That form perhaps will also be more agreeable to you, and is consistent with other rulings of this department made in connection with transactions of a similar nature by the Commissioner of Education.

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

MILITARY RESERVATIONS BEYOND THE JURISDICTION OF
LOCAL OFFICIALS.

The purpose of General Orders 101, series of 1899, was to protect the public health from dangers arising from the consumption of unwholesome meat, and does not authorize an alcalde to prevent the passage through the city to a military reservation of meat which in his judgment is in an unwholesome condition. The military authorities alone are competent to decide whether meat is in proper condition for consumption by troops stationed on military reservations.

Military reservations in Porto Rico are not within the municipal limits or jurisdiction.

OFFICE OF THE ATTORNEY-GENERAL,
February 11, 1902.

SIR: To your communication of the 4th, asking whether the alcalde of San Juan has authority, as claimed by him, to control and regulate the delivery of meat slaughtered and intended solely for the use of United States troops stationed on the military reservation of the United States adjoining the city of San Juan, I have the honor to reply as follows:

The obvious purpose of General Orders 101, series of 1899, upon the provisions of which the alcalde seems to predicate his right to intervene in the premises, was not to protect the public health against the passage of meat through the streets in such an unwholesome condition as to amount to a public nuisance, but to protect the public health from the dangers arising from the *consumption* of unwholesome meat. The use of the streets for the transportation of meat in such a state as to amount to a nuisance is, like other unwholesome matters, controlled only by the general law relating to nuisances. And that law has no application to this question.

The real question is whether the alcalde of San Juan, under the authority of the general order mentioned, may control or prohibit the delivery of meat for consumption by troops of the United States when, in his judgment, it is unwholesome and may impair their health. It is very manifest that this is a matter beyond the jurisdiction of the alcalde and with which the military authorities only are competent to deal. The alcalde has no authority on that ground to prohibit or interfere with the passage through the streets to the military reservations of the United States of meat slaughtered and intended solely for

the use of the troops of the United States. He doubtless has the right, in the exercise of vigilance, to see that no meat introduced into the city upon the pretense of being intended for the United States troops, is stopped in the city and disposed of there for consumption by city residents, unless it has been slaughtered and handled in the manner provided by law. But this is another question, and I merely suggest it in passing. The whole matter will become entirely clear to the alcalde by bearing in mind that the United States military reservation is not to be considered as within the municipal limits or jurisdiction. What goes on in the reservation or what is there done is not subject to review or control even by the insular government. Much less is it subject to review or control by the municipality.

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

ANNULMENT OF CENSOS BY MUNICIPALITIES.

The contention of a registrar of property that a censo may not be annulled by a municipality except upon the authority of the Governor, has no foundation in law. The authority of the "Diputacion Provincial" over municipal acts was plenary, and its powers have been distributed between the Secretary and the Treasurer.

Where the amount required to redeem a censo is fixed, jurisdiction rests with the Secretary; and where the annuity is of such character that the amount to be paid for its redemption is not adjusted by law, but must be ascertained, the annulment would seem to come within the jurisdiction of the Treasurer.

OFFICE OF THE ATTORNEY-GENERAL,

March 8, 1902.

SIR: I have the honor now to acknowledge the receipt of your communication of February 12 requesting an opinion as to the authority of your office to approve an annulment of a censo in favor of the municipality of San Juan, the registrar of property, to whom the proper document was presented for registration, having refused to accept your authority on the ground that it is not sufficient. I regret that my duties in the

legislature have made it impossible to give this matter a more prompt consideration.

In a case of this same general nature I had occasion recently to yield to the request of a registrar for an authorization by the Governor upon a release of a mortgage in favor of the insular government. I took that course, when the point was made, because the matter was of some urgency and I did not wish to delay its consummation until I might have time to examine the question. Since the receipt of your communication, however, I have examined the matter, and I find no warrant in law for the suggestion by the registrar that the authority of the Governor is necessary. On the contrary, as is well understood, the authority of the Diputacion Provincial over municipal acts was plenary, and this authority has been delegated by law partly to the Secretary and partly to the Treasurer, in language so clear as to admit of no dispute as to the completeness of their functions, within their respective jurisdictions, to finally approve or disapprove municipal acts.

Although not within the terms of your reference, I venture to call your attention to the fact that this case, in my judgment, presents a very close question of jurisdiction between the Secretary and the Treasurer. In the distribution of functions formerly enjoyed by the Diputacion Provincial, "financial matters" are excepted in one article from the duties transferred to the Secretary, and in the other "financial affairs" are assigned to the Treasurer. Under article 1608 of the civil code annuities, generally speaking, may be redeemed at will, even though the contrary has been stipulated. But unless the annuity is of such character that the amount to be paid to the municipality is adjusted by law, then its adjustment would seem to be a "financial matter" or "affair" that is within the jurisdiction of the Treasurer. If the amount to be paid for redemption is adjusted by law and does not involve the exercise of any discretion, then the jurisdiction of the Treasurer would seem to attach only after the payment had been made, and the Secretary would seem to be the competent authority to direct the annulment. I have not before me however sufficient data to enable me to reach any conclusion with respect to the particular censo. I have therefore limited myself to the suggestion of a distinction which, in my judgment, should be followed in such cases. If

the censo, within the distinction here suggested, falls within your jurisdiction, I will, upon return of the papers, give proper instructions to the registrar, as suggested by your law clerk; if not, perhaps it would be well for you to consult the Treasurer before taking further steps. In any event, I am of the opinion that the right is lodged in the Secretary or the Treasurer to ascertain whether the proper amount has been paid to the municipality.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

TAXATION OF FOREIGN CORPORATIONS "DOING BUSINESS
WITHIN THIS ISLAND."

The real or personal property of a foreign corporation situated in the island is subject to taxation in the same manner as similar property of citizens and residents is taxed.

But a foreign corporation operating an electric cable, one end of which rests upon the soil of Porto Rico and the other upon the shores of Jamaica, is not doing business within this island within the meaning of an act of the legislative assembly of Porto Rico, entitled "An act regarding foreign corporations," approved January 31, 1901. No use of the cable by the company that does not begin and end in the island can be said to constitute doing business "within" it.

Therefore held, That the West India & Panama Telegraph Company, Limited, cannot be required to file a copy of its charter with the Secretary or to pay the fee required by the act in question for such filing.

OFFICE OF THE ATTORNEY-GENERAL,

March 17, 1902.

SIR: Accompanying your communication of January 28 was the affidavit of Mr. William Stratford Andrews, chairman of the West India & Panama Telegraph Company, Limited, to which are attached documents purporting to be as follows:

(a) Certificate dated April 30, 1901, by the registrar of joint stock companies, of the incorporation in England, under the companies act of 1862, of the West India & Panama Telegraph Company, Limited.

(b) Printed copy of a Spanish royal decree and schedule of conditions, dated May 18, 1868, for the laying of a cable between Cuba and Porto Rico and between other points.

(c) Translation of Spanish order dated April 12, 1874, reciting that the company above named has entered upon the full enjoyment of its concession.

(d) Translation of a royal order dated at Madrid on October 16, 1882, authorizing the return to the company of certain caution money.

There are also duplicates of documents (c) and (d), and two copies of what purports to be a translation of an order dated July 8, 1874, accepting the release by the said company of certain rights in respect to laying a cable between Cuba and Mexico.

By the terms of your letter I am advised that the West India & Panama Telegraph Company, Limited, has presented the above-named documents to you for filing, on the theory that it was required to do so by an act of the legislative assembly, entitled "An act regarding foreign corporations," approved January 31, 1901. But you say that it "declines to pay to the Secretary the fees required by that act¹ for the filing thereof, and which in this case would amount to the sum of \$1,000," upon the ground, as it asserts, that under the terms of the royal decree of May 18, 1868, above mentioned, the said company was granted a franchise for doing business in this island in terms which exempt it from taxation.

Upon these facts and upon these papers you ask for an opinion respecting the status of the company and its relations to the insular government.

From a careful literal examination of the royal decree and the accompanying papers, under which the company in question now claims to be in the enjoyment of a concession to establish and operate a submarine telegraph cable between the islands of Cuba and Porto Rico, I have been unable to find any language which, directly or indirectly, expressly or by implication, may be said to exempt the company from taxation in any form in which taxes may lawfully be levied against it or upon its

¹ The reference to the act regarding foreign corporations as the act in which fees are provided for filing certificates of incorporation seems to be erroneous. That act contains no schedule of fees. It is presumed that the Secretary had in mind an act in relation to the duties of the Secretary, approved January 19, 1901, where, in paragraph three of section nine, provision is made for such fees.

property. But whatever may be the terms of any written concession to the company, and whatever, in the time of Spain, may have been the practice of the existing government with reference to the taxation of the company, with the change of sovereignty another principle of law intervened, which will not escape your attention, and which would seem not only to exempt the company from taxation, except upon its personal property and real estate in the island, but also to relieve it from the necessity of presenting its papers for filing in your office, and you from the necessity of receiving them for that purpose, whether accompanied by a tender of the fees required by law or not.

The third paragraph of section eight of article one of the Constitution of the United States, in which power is delegated to the Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, has been the subject of examination and construction by the Supreme Court of the United States more frequently perhaps than any other one clause in that instrument. And as now interpreted and enforced, the power thus lodged in the national government is practically exclusive in character, and extends not only to the subject matter of interstate and foreign commerce, but to all the instruments engaged in carrying it on. Neither the commerce itself nor the instruments by which it is carried on may be vexed either by state taxation or by state regulation, except under the police power.

This general question is discussed in *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196, in which it is said by Mr. Justice Field, in reference to steamship companies sailing between the United States and foreign lands, that—

If by reason of landing or receiving passengers and freight at wharves and other places in a state, they can be taxed by the state on their capital stock, on the ground that they are thereby *doing business within her limits*, the tax which may be imposed may embarrass, impede and even destroy such commerce. . . . If such a tax can be levied at all, its amount will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect. They require security. And they may rely on the power of Congress to prevent any interference by the state until the act of commerce—the transportation of passengers and freight—is completed.

The same question is considered, but more specifically in refer-

ence to license taxes, in the case of *Crutcher v. Kentucky*, 141 U. S. 47. In that case the law of Kentucky required the agent of a foreign express company to take out a license in that state before doing business there. Mr. Justice Bradley, speaking for the court, in his opinion, says (p. 57):

It is clear, however, that it (the license) would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national and not the state legislature. . . . To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right unless Congress should see fit to interpose some contrary regulation on the subject.

It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend to say that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves and soliciting goods and passengers for return voyage without first obtaining a license from some state officer and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. . . . We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.

The Chief Justice, in *Lyng v. Michigan*, 135 U. S. 161, states the doctrine in this wise:

We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce and amounts to a regulation of it which belongs solely to Congress.

In *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S. 114, Mr. Justice Lamar, speaking for the court, says:

It is well settled by numerous decisions of this court that a state cannot, under guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.

The analogy between a telegraphic message over a cable one

end of which rests upon foreign shores, and the landing of cargoes and passengers at our wharves by a steamship from foreign ports, would seem to be complete. In other words, a telegraph cable between the United States and a foreign country is also an instrument of commerce, and telegraphic communication over it is just as much within the exclusive control of the Congress as are steamship companies engaged wholly in foreign trade, or the cargoes which they carry. If therefore the island of Porto Rico had been admitted into the union as a state, there could be no doubt that the attempt by the insular government to impose any tax upon this company, whether in the form of a license fee or otherwise, as a condition of its right to carry on telegraphic communication between Porto Rico and foreign countries, would be unconstitutional and void.

Although Porto Rico is not a state or an organized territory, nevertheless if you should attempt in the courts to enforce the collection of a license fee from this company it would be strongly contended, and, I doubt not, successfully, that the clause of the Constitution of the United States relating to interstate and foreign commerce is in force here.

It is not necessary for me however to venture any opinion on that question. In fact, in view of its peculiar conditions, the enforcement in this island of all the provisions of the constitution might prove to be so embarrassing to the present prosperity of its people that I am content whenever it is possible to leave the discussion of questions of such gravity to that high tribunal by whose judgments only can such questions be finally settled. But the act was passed by the legislative branch of a new government essentially American in form and in the principles that underlie it. Following a public policy well established in the several states of the United States, it provides that foreign corporations "*before doing business within this island*" shall file a copy of their charter with the Secretary. On its face the act shows that it was taken in substance from the statute book of some state. Its principle is established in the American system, and the phrase quoted conforms to a requirement rendered necessary in a state by the commerce clause of the constitution. For these reasons it seems to me that it must be interpreted here as it would have to be interpreted if the question arose in a court of a state. And therefore the decisions of the Supreme Court of

the United States in relation to similar acts seem to afford a proper basis for the interpretation and construction of this act.

While it may occasion some surprise to a Porto Rican lawyer who has had no occasion to examine such questions, to learn that a foreign steamship company receiving and discharging cargoes in the harbors of this island; and a cable company receiving and delivering messages, are not doing business within the island, within the meaning of the act in question, nevertheless the principle of interpretation here suggested requires me to hold that the West India & Panama Telegraph Company, Limited, is not doing business within the island of Porto Rico. Moreover from a practical standpoint and, without regard to the American decisions, I do not see how it logically may be said that it is doing business within the island. It has no telegraph lines except a submarine cable. It is true that one end of the cable rests upon the soil of this island and that messages are here taken and received. But the other end rests upon the shores of Jamaica, and no single act of business can be transacted over that cable "within this island." No operation of the company that does not begin and end in the island can be said to have been done within it.

The company has voluntarily presented papers for filing in your office, but objects to the payment of the fees that you have demanded. In my judgment and for the reasons here stated, the papers need not be received for that purpose. And I am of the opinion that you are not authorized by law to demand a fee for the filing of them when presented.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

In connection with the foregoing opinion the following memorandum of cases having relation to the suggestion that the cable company had an office in the island and was soliciting business there, was subsequently prepared and forwarded to the Governor.

In *Leloup v. Mobile*, 127 U. S. 640, the Western Union Telegraph Company, upon establishing an office in the city of Mobile, was required to pay a license tax under a city ordinance which imposed an annual license tax on all telegraph companies.

The agent of the company was fined for the non-payment of this tax. In an action to recover the fine he pleaded the nature of the occupation of the company and the fact that its business consisted in transmitting messages to all parts of the United States. It was held that this was a good plea.

The point to be observed is that the company had opened a regular office in Mobile and was soliciting business. On its poles, wires, fixtures and other property in the state it was required to pay taxes at the same rate at which owners of other property so situated were required to pay. The cable company at San Juan is paying taxes on its tangible property, but in addition a license tax was demanded.

Mr. Justice Bradley says, in the course of his opinion (p. 646):

In the present case it is true the tax is not laid upon individual messages, but it is laid on the occupation or the business of sending such messages. It comes plainly within the principle of decisions lately made by this court, (citing cases). . . . But it is urged that a portion of the company's telegraph business is internal to the state of Alabama, and therefore taxable by the state; but that fact does not remove the difficulty. The tax affects the *whole business* without discrimination. . . . In our opinion . . . no state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. And the reason is that such taxation is a burden on that commerce and amounts to a regulation of it which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list (citing many cases).

Norfolk & Western Railroad Co. v. Pennsylvania, 136 U. S. 114, is of special interest in relation to the question whether the having an office in a state is a point of distinction. In this case the railroad company was a Virginia corporation. It had an office in Philadelphia for the use of its officers, stockholders, agents and employees. It was sued for the non-payment of a license tax and judgment for \$7,500 was rendered against it. It was held that the tax for occupying an office in Philadelphia was a tax upon interstate commerce and in violation of the commerce clause of the constitution.

The essence of this case was quoted in my letter to the Secretary; but I have stated the facts so that the citation will be more clear. It is further said by Justice Lamar, in the course of his opinion:

What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations.

Further on it is said that the office was maintained because of the interests of the interstate business of the company and for no other purpose; and a tax upon it was therefore a tax upon an instrument of interstate commerce, and as such was in violation of the constitution.

Pomeroy, in his work on Constitutional Law, section 278, referring to the word "commerce," says:

It includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic again embraces all the means, instruments and *places by and in which* intercourse and traffic are carried on, and further still comprehends the act of carrying them on *at these places*, and by and with these means.

There are many cases in the Supreme Court of the United States where agents of railroad companies have been fined under state laws or municipal ordinances for the failure to pay some city or state tax. Invariably in all these cases judgments have been reversed on appeal. *McCall v. California*, 136 U. S. 104, is such a case. Of course, the soliciting of business for a railroad company usually, and possibly invariably, signifies the possession of an office where tickets are sold and other transactions for the particular railroad are carried on. Under the definition last stated these places and the business carried on in them are all a part of interstate commerce and are protected against state regulation or tax by the commerce clause of the constitution. The test, as stated in the latter case by Mr. Justice Lamar, having reference to the soliciting of business by an agent, is "Was this business a part of the commerce of the road? Did it consist or was it carried on with the purpose of assisting in increasing the passenger traffic on the road?"

Postal Telegraph Company v. Charleston, 153 U. S. 692, brings out the distinction very clearly between local taxation that is constitutional and that which is unconstitutional, and seems to throw much light on the question of demanding a license tax from the West India & Panama Telegraph Company. There the telegraph company had offices at Charleston, at which it received business for other states and also for

the state of South Carolina. The city, by ordinance, imposed a license fee, but limited it to business done by the company exclusively within the state. This ordinance was upheld. There are also other cases in which the state laws were adjusted so as to be a burden only upon telegraph business done within the state. These statutes have been upheld. They bring out in clear relief the distinction between such business and the business of a cable company, which is altogether incapable of doing business "within a state."

INDEPENDENCE OF THE JUDICIARY—FUNCTIONS OF THE
ATTORNEY-GENERAL.

The Attorney-General will not intervene in matters pending before the courts, whether civil or criminal, except when charged by law with the duty of doing so.

OFFICE OF THE ATTORNEY-GENERAL,

March 19, 1902.

SIR: In your communication of yesterday you say that the District Court of Ponce has pronounced an unjust judgment in a declaratory action, in which your clients were defendants and Mr. Francisco Almodovar was the plaintiff. After stating the facts upon which you base your opinion that the judgment of the court results in an injustice, you ask me to order a revision by the court of the conclusions reached, and that in the meantime the execution of its judgment may be suspended.

You refer to yourself as an attorney in active practice before the courts of this island. For that reason I am sure that upon reflection you will see how far your request mistakes the functions that lawfully pertain to this department. I should not indeed be able to respect my office or continue to perform my duties if I permitted myself, or were permitted by law, to intervene in the manner in which you suggest. This government cannot long maintain the constitutional guaranties unless the independence of the judiciary is protected, particularly by those who are specially charged with the performance of duties in connection with the judicial system. And this department has not, since I assumed charge of it, or before, so far as I am ad-

vised, ever directly or indirectly intervened in the administration of civil justice by the courts of the island, or in the execution of the criminal laws, except when charged by law with such jurisdiction. And so long as I have the honor to remain in this office no such request as you make shall have consideration. I may add that I hope and have every reason to believe that my successors will take the same view of their duties.

Very respectfully,

JAMES S. HARLAN.

J. R. BUTERBAUGH, Esquire.

FINES BY COURTS—PARDONING POWER OF THE GOVERNOR.

A fine by a district court for the failure to obey a summons, when paid into the insular treasury may not be returned by the Treasurer even upon the order of the court. Such a fine is penal in character, and can only be returned upon the order of the Governor under the pardoning power.

Arecibo, March 10, 1902. Felipe Cuchi, presiding judge of the district court, requests that fine imposed on Manuel Rivera y Rivera be returned to him.

[1st endorsement:] Office of the Treasurer of Porto Rico, March 15, 1902. Respectfully referred to the Attorney-General of Porto Rico, requesting information on the matter herein contained, in order to ascertain whether this office may return the fine imposed on Manuel Rivera. WM. F. WILLOUGHBY.

[2d endorsement:] Office of the Attorney-General, *March 21, 1902.* Respectfully returned to the Treasurer of Porto Rico. I am of the opinion that the Treasurer has no power to comply with this request. I am also of the opinion that the court has no power over a fine which has been paid into the treasury. These fines were imposed upon the defendant Manuel Rivera and some witnesses for their failure to appear when properly summoned. The power of the court to punish for such failure is, in its general nature, to be classified as a penal power. And while I have no doubt that the court for good cause shown may before payment revise its judgment and annul a fine levied for the failure to obey process, nevertheless after it has been paid

and has reached the hands of the Treasurer, it has passed beyond the power of the court, and may be reached, if at all, only under the pardoning power of the Governor. The fact that Mr. Rivera was subsequently acquitted of the charge against him seems to have no just bearing upon his failure to obey the summons of the court. JAMES S. HARLAN.

SCHOOL TAX—TAX FOR BONDED INDEBTEDNESS.

The act authorizing and regulating the issuing of bonds by municipalities, approved January 31, 1901, contemplates a special tax to be raised under a special municipal ordinance for the purpose of paying the interest on the bonds, and of creating a sinking fund for their redemption. The moneys thus collected are strictly trust funds and may not be diverted to other municipal purposes. Such taxes therefore are not subject, under the school laws, to a fifteen per cent deduction on behalf of schools.

March 14, 1902. Alcalde of Humacao thinks that he has found a defect in the municipal laws.

[1st endorsement:] Office of the Treasurer of Porto Rico, March 15, 1902. Respectfully referred to the Attorney-General of Porto Rico, requesting information on the matter herein contained. WM. F. WILLOUGHBY, Treasurer.

[2d endorsement:] Office of the Attorney-General, *March 21, 1902*. Respectfully returned to the Treasurer of Porto Rico. I see no inconsistency in the laws referred to by the alcalde. Section 5 of the act to establish a system of public schools in Porto Rico, approved January 31, 1901, as amended by a recent enactment of the legislative assembly, provides that not less than fifteen nor more than twenty-five per cent of all taxes collected and funds received from the insular treasury shall be set aside by each municipality and kept as a separate fund under the name of school funds. On the other hand, the act to authorize and regulate the issuing of bonds in the cities of Porto Rico, approved January 31, 1901, contemplates a special tax to be raised by a special municipal ordinance for the special purpose of paying the interest on bonds issued by a municipality and of creating a sinking fund for the redemption of such bonds. The moneys thus collected for interest and sinking fund may

not be disposed of by municipal ordinance for other purposes. Neither the municipal council nor the Executive Council can control its disposition. They are strictly trust funds, not subject to diversion from the purposes specified in the law. In my judgment taxes collected under this special act for this special purpose cannot be subjected to a fifteen per cent deduction on behalf of schools; nor does section 5 of the act above referred to require the setting aside for school purposes of an additional fifteen per cent of the amount collected to pay the interest and sinking fund on a municipal indebtedness. I express these views subject to revision in case the same point shall arise in a more formal manner. JAMES S. HARLAN.

NOTARY FEES—APPEAL TO ATTORNEY-GENERAL.

Without deciding whether the schedule of fees that may lawfully be charged by notaries is applicable also to lawyers when acting as notaries, the attorney-general, in the absence of expert testimony of the value of the notarial services rendered by a lawyer, will accept the schedule as a guide in reaching conclusions on an appeal to him of a matter wherein the amount of the fees charged is in controversy.

When a notarial deed does not specify the price or consideration for the subject matter of the contract and contains no terms from which the value involved may be ascertained with reasonable certainty, it falls under article 1 of the schedule of fees, and the charge of the notary for drawing it must be fixed at the rate of one dollar for each folio.

For drawing a notarial deed under which one estate is granted an easement of way through another, it is not competent for the notary to charge one half of one per cent of the aggregate value of the dominant and servient estates, but the charge must be computed with reference to the value of the easement. And in the absence of any other suggestion, the attorney-general will fix the value at five per cent of the value of the dominant estate in accordance with the precepts of the laws of mortgages.

Upon the findings of fact and conclusions of law stated in the opinion the charges of the notary are reduced from \$1,881.05 to \$195.05.

OFFICE OF THE ATTORNEY-GENERAL,

March 24, 1902.

FILIFE CASELDUC GOICHECA, A NOTARY, vs. MESSRS. DEFORD
& COMPANY, BANKERS.

Appeal to the Attorney-General under the provisions of an order issued by the Secretary of Justice on January 31, 1899.

STATEMENT.

Mr. Filipe Caselduc Goicheca, a lawyer of Ponce, who has qualified also as a notary under the provisions of an act of the Legislative Assembly of Porto Rico entitled "An Act relating to notarial practice in Porto Rico," approved January 31, 1901, has rendered to Messrs. DeFord & Company, bankers, an account, consisting of fifteen items and amounting to \$1,881.05, for notarial fees and charges claimed by him to be due for his services in drawing three notarial documents herein and in the papers accompanying the appeal referred to as numbers 59, 60 and 61. The account was not satisfactory to Messrs. DeFord & Company, and in a friendly conference an effort was made on both sides to reach an adjustment of the matter. But the parties having failed to come to an agreement, Mr. Francisco Parra Capó, also a lawyer of Ponce, on behalf of DeFord & Company, presented to the District Court of Ponce formal objections to the charges thus made by Mr. Caselduc. That honorable court, by an order entered on November 26, 1901, has now referred the account and the objections to me in accordance with the requirements of the order of the Secretary of Justice above mentioned. And following the provisions of that law, I have referred the papers to the College of Notaries for an examination and an expression of opinion as to the merits of the controversy.

There are now before me copies of the three notarial documents mentioned, an itemized statement of the account of Mr. Caselduc, together with his written comments in support thereof, the objections by Mr. Francisco Parra Capó and the written opinion of the College of Notaries.

Having carefully examined each of these papers, as well as the reformed notarial schedule of fees and charges, I now declare the following:

FINDINGS.

1. It appears that the said Filipe Caselduc Goicheca is not enrolled, under the original act of 1874, as a duly qualified notary with his own archives; but that he is exercising notarial functions in virtue of the permissive act of January 31, 1901, above mentioned. There is no express provision in the latter enactment relating to the compensation to be paid for nota-

rial services rendered by lawyers who have qualified as notaries. But without entering into any discussion of the question that has been suggested on the papers before me, as to whether lawyers acting as notaries are bound by the schedule of fees to which the regular notaries are required to conform, it will be sufficient to say that, in my judgment, that schedule, in the absence of any expert testimony or statements as to the value of the services rendered to the respondents, must be accepted as a guide in reaching a conclusion on this appeal and must be adopted as the measure of the value of the services performed by the claimant.

2. Items 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 14, 15 of the account rendered are for revenue stamps, copying charges, etc., and the minutes of the issue of copies in connection with the execution of the three documents above mentioned. In my judgment, and in this the College of Notaries concurs, these items, amounting to \$55.05, are not only reasonable, but must be allowed as the result of the application to this matter of the notarial schedule.

3. Notarial deed number 59 is based on the fact that Messrs. DeFord & Company own a central at which cane is ground, and the Distino Company owns a plantation nearby upon which cane is grown. It is an ordinary contract for the grinding of cane. It provides that the product of from 350 to 1,000 cuerdas of the plantation mentioned shall be ground at the DeFord mill, and that as compensation for this service the mill shall retain seven-sixteenths of the sugar. There are other clauses in the document whereby the respondents undertake to build a railroad track for the transportation of the cane and in case of fire on the plantation to render assistance. The deed specifies neither price nor pecuniary consideration for the performance of its obligations by DeFord & Company. There is no provision in the document from which the value of any object expressed therein may be ascertained with certainty. It does not therefore fall within article 2 of the reformed schedule. The claimant, to supply this want of definiteness in the contract, takes the common average yield of cane and the average yield of sugar from cane when ground, and by such reasoning has arrived at an estimate of the value involved in this deed. It is obvious however that this is not a proper test. The cane

may be destroyed by fire before it reaches maturity or the crop may entirely or partially fail. Moreover, the option of planting a minimum of 350 and a maximum of 1,000 cuerdas is expressly reserved. The covenant therefore is not based on a thing the value of which may be estimated. It only states the basis upon which the respondent shall be compensated.

In my judgment, this deed must be considered simply as a contract for work of the character specified in article 1 of the schedule of notarial fees; and although it may seem to some extent inadequate, nevertheless, under the schedule, the charge for drawing it must be fixed at the rate of one dollar for each folio. I am therefore of the opinion that the claimant's item number 1, must be rejected and the sum of \$15.00 substituted.

4. Notarial deed, number 60, is a covenant whereby the respondents, DeFord & Company, as owners of a central, agree to explore the Distino estate for water, and in case none is found, to install at their own expense a pump with a capacity of 2,500 gallons a minute in order to furnish water for the proper irrigation of those lands. In this deed it is further provided that DeFord & Company will advance to the Distino Company the sum of \$20,000 for the purpose of making improvements upon its plantation.

That portion of this document relating to the finding of water and, in case of failure, to the erection of a pump, cannot be said to involve an object of value, for water may be found and the cost of erection of a pump may thus be avoided. Nor is that portion of the contract susceptible of appraisalment. The amount of money to be advanced is, however, specified, and this deed may therefore be said to be controlled by article 2 of the schedule, under which a fee at the rate of one half of one per cent on the \$20,000, amounting to \$100 would be proper. In this conclusion the College of Notaries also concurs.

Item 6 of the account rendered, being a charge of \$150, should therefore be rejected and an item of \$100 substituted.

5. Notarial deed, number 61, creates an easement of way in favor of DeFord & Company for the railroad above referred to over the plantation of the Distino Company. The easement is not defined by metes and bounds, but is a general right of way for the laying out of which any part of the servient estate may be selected by the respondents, the route being left to the

option of the owners of the DeFord mill. The deed also provides that branch roads may be built when found necessary for transporting cane from the plantation to the mill.

The claimant has made up a charge of \$1,352 for drawing this instrument, and explains the item by stating that the two estates mentioned in the deed are valued in the aggregate at at \$270,400. His charge is one half of one per cent of this amount. He supports this item under article 2 of the schedule, which refers to "valuable objects or sums stated as the value thereof." His theory is that inasmuch as the contract specifies two estates of the value of \$270,400, through which the easement is to run, a charge of one half of one per cent is permissible under that section of the schedule. The College of Notaries estimates the fee at the same amount. I do not concur in this view. It is merely a fortuitous circumstance that the two estates are so large and have that value. They might be of a much less value and still be important enough to be made dominant and servient to such an easement of way. Moreover I find no authority in law for estimating the fee on that basis. Undoubtedly the only logical manner of computing a charge for the drawing of that deed is to arrive at some conclusion as to the value of the easement.

I find in the Spanish law of mortgages, in paragraph 6 of the general rules attached to the schedule of fees of registrars of property, a precept which fixes the general value of easements, for the purpose of estimating the registrar's fee, at five per cent of the value of the dominant estate. The same principle is set forth in paragraph 3 of article 70 of the regulations in relation to fees on the transfer of property. And in the absence of any other suggestion as to a lawful method of estimating the proper fee for deed number 61, I am compelled to adopt that precept as a basis for adjusting the charge. In that document the dominant estate is valued at the sum of \$100,000. Five per cent of this amount is \$5,000, which must be taken as the value of the easement. One half of 1 per cent of this value is \$25.00, which, according to this method, must be fixed as the amount of the fee due to the notary.

The aggregate of the several fees thus fixed amounts to \$195.05. Upon the papers before me, this is the closest approach to a just solution of the question that I have been able to reach.

I therefore declare and fix the amount due by Messrs. DeFord & Company, the respondents, to Mr. Filipe Caselduc Goicheca, the claimant, for the drawing of the documents numbered 59, 60 and 61, and for the other items mentioned in his account, at the aggregate sum of \$195.05.

And in obedience to the requirements of law, I forward this declaration to His Excellency, the Governor of Porto Rico, for such action as he may deem proper.

JAMES S. HARLAN.

The GOVERNOR.

PUBLIC LANDS AND BUILDINGS—JURISDICTION OF THE COMMISSIONER OF THE INTERIOR.

The Commissioner of the Interior represents the insular government in respect to public lands and buildings. The mere fact that the particular property in question has been acquired for school purposes does not authorize the Commissioner of Education to sign documents relating to its title.

March 29, 1902. Commissioner of Education encloses document just received from the municipal judge of Rio Piedras requesting his signature in his official capacity to a statement as to the boundaries of the normal school property.

[Endorsement:] Office of the Attorney-General, *March 29, 1902*. Respectfully returned to the Commissioner of Education, with the statement that this is not a proper document for him to sign. Under the organic act the Commissioner of the Interior alone has the representation of the insular government in respect to public lands and public buildings. The mere fact that the particular property is recorded in the name of The People of Porto Rico for school purposes does not give to the Commissioner of Education the authority to sign such documents. I therefore recommend that the Commissioner of Education refer this document to the Commissioner of the Interior, with the request that he report to this department the result of his official surveys and the official searches in the records of his department. In the meantime I have directed the municipal judge to proceed no further with this matter until he has a proper service upon the Commissioner of the Interior. JAMES S. HARLAN.

LABOR SOCIETIES NOT UNLAWFUL.

The right to assemble peaceably together for mutual consultation and joint endeavor to better social conditions is fundamental, and any law of Spanish origin that impairs this right is contrary to our form of government and has become a nullity with the change of sovereignty. Such a law, in its effective result, is an abridgment of liberty.

The District Court of San Juan having sentenced several members of the Federación Libre to imprisonment for participation in a meeting at which nothing further was done than to resolve to demand an increase in wages, on the ground that it was a conspiracy to raise the price of labor, the Fiscal of the Supreme Court is directed by the Attorney-General to admit that the appeal of the prisoners is well taken and to quash the proceeding.

OFFICE OF THE ATTORNEY-GENERAL,

April 9, 1902.

SIR: In view of the fact that the case against Santiago Yglesias *et alios* is set for argument to-day, it becomes necessary, in response to your communication of February 25, which at a later date was the subject of a conference between us, formally to express to you my views on the questions involved.

It appears from the record in the case that at the time of the change of money in the island, when Spanish money ceased to be a legal tender and the national currency took its place, it was resolved at a meeting of the members of the "Federación Libre" to make a general demand for an increase in wages. In order to give effect to this resolution the association appointed an arbitration committee to confer with employers. The employers refused to comply with the demands of the workingmen, and as a result of this state of affairs there arose some disorder and acts of violence.

You are familiar with the provisions of the judgment of the District Court of San Juan, under which certain members of the federation were sentenced to terms of imprisonment varying from four months and twenty days in jail to three years, four months and eight days in prison. It is not necessary therefore to refer to the sentence in detail. It is true that acts of violence followed the failure of the employers and employees to reach an agreement. But as I understand the matter, the court, without finding that these defendants were guilty of such

violence, has attached criminal responsibility to the mere participation by them in a meeting at which nothing further was done than to resolve to make a demand for higher wages. More than this, the expediente in this office shows that the explanation of the sentence of three years, four months and eight days pronounced against the principal defendant, Santiago Yglesias, is that he, upon a vote of the court, was held to be the founder of the society in question. The court seems to have considered from all the facts in the case that they constituted two connected offenses, one of being members of an illegal association and the other of participation in what is referred to by the court as a conspiracy to raise the price of labor.

Although I concur with you in entertaining considerations of deference for the decisions of the judges of that court, nevertheless I am of the opinion that the judgment announced by it in this case has the character, in its effective result, of an abridgment of personal liberty. The right to assemble peaceably together for mutual consultation and for joint endeavor in an orderly manner to better social conditions is surely fundamental. If any Spanish law in Porto Rico, in terms, impairs this right, in my judgment it has lost its force and become a nullity with the change of sovereignty. Such a law is contrary to the spirit of our form of government.

For these reasons I am of the opinion that it is in the interest of public justice to admit on the argument this morning that the recourse of cassation is well taken. I so request.

In expressing these views, you will fully appreciate that I draw a clear distinction between violence and breach of the laws and the right to assemble together in an association in the manner set forth in this record. In my judgment, the latter right should not be curtailed, while violence should be repressed upon all occasions. Breach of the law and physical force can never be tolerated in any well-organized community as a means of enforcing demands of this or of any character.

In conclusion I wish to thank you for your very clear statement of the case and of the conclusions reached by you, in which I entirely concur.

Very respectfully,

JAMES S. HARLAN.

The FISCAL OF THE SUPREME COURT.

RIGHT OF PHYSICIANS TO DISPENSE MEDICINES.

The royal decree of April 18, 1860, still in force, forbids a physician to conduct a pharmacy, but does not forbid him to dispense medicines in connection with his practice.

A person entitled to practice as a physician may dispense the necessary remedies in connection with such practice.

Atkins, Grace Williams. About dispensing and compounding of drugs by physicians on their own prescriptions.

[1st endorsement:] Office of Superior Board of Health, April 9, 1901. Respectfully forwarded to the Attorney-General, through the Commissioner of the Interior, for his opinion. The board is of the opinion that the existing law forbidding the dispensing of medicines by physicians is one that ought to be modified at the earliest possible moment. It is necessarily violated every day by all physicians making country visits or in prescribing for emergencies. The board will be very glad if some way can be found to harmonize the laws here with those existing in the United States, where all physicians can dispense their own medicines if they so desire. Of course they cannot in the United States conduct a pharmacy without a license from a state board of pharmacy. R. M. HERNANDEZ, M. D., President.

[2d endorsement:] Office of the Commissioner of the Interior, April 12, 1902. Respectfully forwarded to the Attorney-General. JUAN B. RODRIGUEZ, Acting Commissioner.

[3d endorsement:] Office of the Attorney-General, *April 12, 1902*. Respectfully returned to the Acting Commissioner of the Interior. I am unable to find the Spanish law said to have been "enacted in 1860 which forbids any physician to compound or dispense drugs," mentioned in the within communication. The president of the superior board of health in the first endorsement also speaks of such law; but I have been unable to find it. It is probable that the druggists of San Juan in making their complaint against Dr. Atkins had in mind the royal decree of April 18, 1860. This decree simply forbids a physician to conduct a pharmacy, and it does not forbid a physician to dispense medicines in connection with his practice.

I know of no other law relating to the question, and under that decree Dr. Atkins, who, as I understand it, is not conduct-

ing a pharmacy or drug store, is, in my judgment, absolutely free to continue the practice of medicine under a physician's license issued in accordance with law, and is free to dispense the necessary remedies in connection with such practice. If there is any other law relating to the question I shall be glad to be advised; but until so advised I must hold that the complaint of the druggists of San Juan against Dr. Atkins is not well founded.

JAMES S. HARLAN.

MUNICIPAL REGULATION OF THEATRES.

The police regulation of theatrical performances is in the hands of the municipal authorities, subject to the usual right of appeal to the Secretary.

OFFICE OF THE ATTORNEY-GENERAL,

April 12, 1902.

SIR: In reply to the communication of March 11, of the Assistant Secretary, asking whether the old Spanish law regarding theatres is still in force, I have the honor to say that the police regulations governing performances, as the same are found in the Official Gazette of March 10, 1891, are still in force, and under these regulations the control of theatres is in the hands of the municipalities, subject of course to the usual right of appeal to the Secretary's office.

There are some articles among those regulations that perhaps have been modified to some extent by the new conditions; but it does not seem necessary at this time to refer to them in detail.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

TRICOCHÉ HOSPITAL—RELATIONS WITH THE MUNICIPALITY
OF PONCE.

As the contract between the Sisters of Charity and the municipality of Ponce contains a clause providing a method for adjusting differences and of severing the contractual relation between the respective parties, *Held*, that the contract cannot be terminated otherwise.

OFFICE OF THE ATTORNEY-GENERAL,

April 15, 1902.

SIR: I have the honor now to acknowledge the receipt of your communication of the 3rd of March, enclosing a copy of a contract between the municipality of Ponce and the Sisters of Charity, dated at Madrid on November 6, 1888, and having relation to the administration by them of the Tricoche Hospital.

You have invited my attention to article 3, and you ask whether the contract, in view of the terms of that article, may not be considered as void. That article is as follows:

3. The Sisters of Charity shall observe the rules of the establishment and the instructions of the director, provided that the same are not in conflict, directly or indirectly with their regulations.

The point, as you state it, is that as the regulations of that religious society are unknown to the municipal council, it is impossible for that body, through the director of the hospital, to prepare rules for the hospital, because under the terms of article 3 the members of the council do not know which rules so prepared will be respected and which will be disregarded on the ground that they are in conflict with the regulations of the sisters.

I am of the opinion that the contract cannot be declared void on this ground. It amounts in fact only to the possibility of a conflict of rules, and not to the actual existence of such a conflict. It would clearly be inequitable to insist upon the nullity of a contract on account only of such possibility. For all that appears, no such conflict might exist in fact, and indeed there might be no possibility of such a conflict. I think you will appreciate this point of view.

Moreover, even if there were a conflict, it would not be a sufficient ground for a nullification. The contract must be taken as the basis of the mutual rights established by the two parties

in interest. Under its terms they have provided a method of adjusting differences, and, in case of a failure to adjust them, a method of severing the contractual relation. I do not see how the contract can now be changed by either party without the consent of the other. If a difference exists, in my judgment, it can be adjusted or the relation terminated under the terms of section twenty-two, but not otherwise.

This opinion is based on a translation made in this office of an uncertified copy of the contract in question.

I have the honor, sir, to remain very respectfully,

JAMES S. HARLAN.

The ALCALDE OF PONCE.

BOND OF THE TREASURER OF PORTO RICO.

The Treasurer of Porto Rico has no "legal representatives" as that phrase is commonly used.

The appointment of an Assistant Treasurer and his right to act as the head of the department in case of the absence, illness or disability of the Treasurer are matters controlled by law. It is not competent therefore for the Treasurer in his official bond to undertake that such appointment of an Assistant Treasurer and his right to act as Treasurer shall be subject to control by a bond company acting as surety upon the bond.

OFFICE OF THE ATTORNEY-GENERAL,

April 26, 1902.

SIR: Under section 22 of the organic act of Porto Rico, it is the duty of the Attorney-General to approve the Treasurer's bond as to form, and the Auditor of Porto Rico has handed to me for that purpose a form of bond executed by the Fidelity & Deposit Company of Maryland and transmitted to the Treasurer for his signature.

I have two objections to this form of bond:

(1) The last paragraph in the bond permits your principal to terminate its obligation by giving notice to the Treasurer of Porto Rico "or his legal representatives." The Treasurer of Porto Rico can have no legal representative, as I understand the legal meaning of that phrase. I suggest therefore than instead of those words there be inserted the words "or to the Governor of Porto Rico."

(2) On page two of the bond there is a provision which seems to me wholly objectionable. The appointment of an Assistant Treasurer and his right in case of the absence, illness or disability of the Treasurer to act as Treasurer, are matters controlled by law. The paragraph in parentheses purports to subject his appointment and his right to act to the approval of your principal. It does not seem to me that this provision may lawfully be incorporated in the bond. The appointment being controlled by law, it is not lawful for the Treasurer to undertake that it shall also be subjected to control by your company. I am unwilling to approve the bond in that form.

The whole question of the bond has had very careful consideration and I furnished you with a form satisfactory to the government, and which upon further investigation I hope will prove satisfactory to your company. I return the bond for correction.

Very respectfully,

JAMES S. HARLAN.

E. L. ARNOLD, Esquire,

Local Trustee of the Fidelity & Deposit Company.

PONCE MURDER CASE—EX POST FACTO LAWS.

At the time the crime in question was committed the law required that in all cases where the death penalty was demanded two additional judges should sit, thus making a court of five judges; the law also provided that a majority vote of the judges in all cases should be the judgment of the court. After the crime was committed the courts were reorganized, the procedure reformed and the requirement of five judges in a case of capital punishment definitely repealed. Under the new law a court of three judges was competent to sit in all criminal cases without regard to the penalty demanded.

Held, that so long as the principle that the judgment of a majority of the court should stand as the judgment of the court was not modified, a mere reduction in the number of judges after the commission of an offense is not within the ex post facto theory of criminal law.

Although as a mere matter of numbers it is necessary in a court of five that three votes shall concur in order to arrive at a majority, nevertheless article 145 of the law of criminal procedure is not to be considered as requiring a concurrence of three votes as a principle of law, but only a concurrence of three votes in order to constitute a majority of a court of five.

So long as the majority principle upon which a court must base its decision in a criminal case is not changed, the mere alteration in the number of the judges after the commission of the offense, is not a matter of substantive law affecting substantial rights. The right to reorganize the courts after the commission of an offense remains in the control of the legislature, to be determined upon grounds of public convenience, and such changes, as to crimes committed before the change is made, are not obnoxious to the *ex post facto* principle of law.

OFFICE OF THE ATTORNEY-GENERAL,

April 28, 1902.

SIR: On the 27th day of June, 1900, in the District Court of Ponce, Bernabe Acevedo, José Torres, Ramon Troche, Juan Torres and Antonio Torres Acevedo were found guilty of the murder of Antonio Delgado. In the more accurate language of the court, they were convicted of robbery resulting in murder. The crime was accompanied by the rape of a member of the household of the victim.

All the prisoners having been sentenced to death by the garrote, the recourse of cassation was interposed on their behalf and the case carefully argued before the Supreme Court. After due deliberation, that court, on the 10th of February, 1902, confirmed the sentence of the lower court, Mr. Justice Figueras not participating and Mr. Justice Hernandez dissenting.

After the decision by that court and before its sentence was made final, the Chief Justice, in accordance with a requirement of law, referred the case to the Fiscal of the court for his suggestions. The Fiscal returned the case with an expression of opinion adverse to the commutation of the death penalty. The Chief Justice, as he is permitted by law to do, then addressed a communication to you, dated on the 28th of February, stating his own views in relation to the question of clemency, and concluding with a recommendation in behalf of himself and Mr. Justice Hernandez that the death penalty be commuted to the penalty of chain for life. In this recommendation the Chief Justice states that Mr. Justice Sulzbacher and Mr. Justice McLeary do not concur. The last mentioned communication, together with copies of the sentences of the District Court and of the Supreme Court, and a copy of the dissenting opinion of Judge Aponte in the former court and of Mr. Justice Hernandez in the latter court, are herewith enclosed. Having carefully studied these documents with a keen appreciation and deep

sense of the responsibilities resting upon me, and the record in the case having been scrupulously examined in this department, it now becomes my duty to report to you on the petition of the prisoners for clemency, which you have forwarded to me for that purpose, and upon similar petitions numerous signed by citizens of Porto Rico, which have also been sent here for examination.

The record in the case reveals a crime of unusual brutality and atrocity. Antonio Delgado y Delpino, at the time in question, lived in a lonely and uninhabited neighborhood in a rural district of the municipality of Adjuntas. The District Court and the Supreme Court in their opinions state that he was a hard-working man of good habits and of a charitable disposition; and that he was esteemed and respected in the place in which he lived. It is also said that he was a man of peaceful character. That this was the fact is very evident, for it does not appear, through page after page of the detailed narrative of the crime in the record, that there was on his place at the time a single weapon of offense or defense. Moreover, he was seventy years of age, and had therefore reached a period of life when successful resistance to physical aggression was not to be expected.

The crime occurred on the 30th of September, 1898. There were living with him in his dwelling-house at the time, two sons, a nephew, two laborers, his wife and daughters, and some women servants. The house had been closed for the night and the family apparently had retired to their rest. Suddenly, at about the hour of nine, there came a loud knock at the door and a demand for admission in the name of the law. This demonstration was made by a gang of men who quietly and without previous warning had stolen upon the premises, armed with firearms and machetes. After they had knocked upon the door, a demand for admission was made in the name of the American military guard of Adjuntas. The old man, yielding prompt obedience to this order given in the law's name, at once made his way to the front door and opened it. He saw before him a number of men, some with their faces disguised with charcoal or smut, and others with masks made of pocket handkerchiefs or rags.

The male members of the house were at once seized and be-

ing first bound hand and foot were taken to a machine house a few feet away and there detained by a guard left for that purpose, who threatened to blow their brains out if they stirred. The women of the household were taken to an inner room where they were locked in.

So far away was the plantation from any neighbors that nothing of what had happened during the night was known to them until morning, nor did the imprisoned members of the household see what took place. But when Antonio Delgado y Delpino was next seen, he was hanging dead, almost on his knees, suspended by a rope in a wooden shed, his hands and feet tied together. Both of his ears had been cut off. His face and head were bloody with wounds, and his body was otherwise bruised. So far as I am informed by the record, no eyewitness has testified whether the old man was first killed and then mutilated or first mutilated and then killed.

In the morning the whole place was found in confusion. Boxes and trunks had been broken open and the contents scattered on the floor. A large quantity of property was missing, showing that a robbery had been committed. From the condition of the place it is apparent that the robbers and murderers had gone there seeking some large treasure which they supposed to be in the house. There is no other sufficient explanation of the hasty and indiscriminate ransacking that took place. So far as his family could explain he had no enemy in the world. And although, as I have said, no eyewitness appeared on the trial who could so state, it is reasonable to think that the mutilation and cruelties practiced on the person of Antonio Delgado y Delpino occurred before his life was extinct, and in the effort to make him confess or show where his supposed treasures were concealed.

The story of this tragedy will not be complete without a further reference to a fact that has already been alluded to. The defendant José Torres, after the female members of the household had been locked up in a room, returned to it and, being armed with a revolver, called forth Theresa Garcia. He dragged her by the hand to one of the corridors of the house where he forcibly ravished her. Soon after this, the defendant Bernabe Acevedo, also armed, sought out the same victim and taking her to another room nearby, was guilty of the same crime.

In addition to the five men sentenced to death in the trial court, there were nine other defendants, all charged with participation in the crime. Among others were Gregorio Cardona, Nicolas Feliciano, Pascual Troche and Eugenio Rodriguez. The latter died pending the trial. The other three had not been arrested at the time of the trial, and as to them the action was therefore suspended. Of these, Pascual Troche was finally apprehended and sentenced to imprisonment for life by the United States District Court for the murder of one Jacinto Sansot. The deceased Eugenio Rodriguez was also charged with guilt in that murder. Nicolas Feliciano has not yet been apprehended, although in addition to the charges against him for this murder, he was charged with guilt in connection with the murder of one Prudencio Mendez. The five other defendants, Rafael Cruz y Velez, Antonio Rivera, José Vera Lopez, Enrique Torres, Olan and Juan Manuel Serrano were acquitted by the court for lack of sufficient evidence. I mention these matters as an indication of the sifting process gone through with by the trial court upon the evidence, and of its deliberate and careful weighing of the testimony before arriving at the conclusion of guilt against the five defendants now imprisoned at Ponce.

The foregoing statement of facts is based upon the sentences of both courts, which, under this judicial system, include findings of fact and conclusions of law, and are therefore more like the opinions of our state courts; upon an examination of the record, and a study of the dissenting opinions. From the investigation that I have made, I have been forced to the conclusion that nothing appears on the record to justify a reasonable doubt as to the correctness of the findings of fact by the trial court or of the guilt of the accused. To take any other view of the case would mean simply the substitution for your consideration of my own opinion for the judgment of the judges of the District Court, who had the advantage of hearing the witnesses testify in open court, and of observing them under cross-examination and when they were confronted and brought face to face with the accused.

Moreover the oral evidence taken on the trial, which, according to the Spanish system, is not fully preserved in the record, doubtless added strength to the conclusions reached by the trial

court. The Chief Justice, in his communication to you, gives better expression to this thought when he says :

Certainly all these questions . . . could not have escaped the careful attention of the honorable judges of the District Court of Ponce, who undoubtedly, with the additional information furnished in the oral trial, must have conscientiously arrived at the conclusion contained in the judgment as to the presence of the five prisoners sentenced to death in the gang of forty or fifty malefactors who entered the house of Antonio Delgado the night the horrible crime was committed.

I come now to the consideration of the papers filed in connection with this application for pardon. There is no suggestion in any of these documents of new evidence of any kind. And, in fact, the only statement made upon any of the papers before me which does not proceed upon the theory that the prisoners are guilty, is a letter that reached the Supreme Court through the mails, purporting to have been signed by Pedro Acevedo Torres, one of the witnesses against the prisoners at the trial. It is not sworn to and the statement is contained on a single sheet of writing paper. The writer of the document declares that he was induced to testify against the prisoners because of threats by the police. This statement is overwhelmed on the record by the statements of the three policemen themselves. He also states that Theresa Garcia in his presence received three hundred dollars in money from a policeman as an inducement for stating in her testimony that the assault had been committed upon her by two of the defendants.

This letter was sent by this department in July, 1901, to the Fiscal of the District Court of Ponce with directions to make a thorough examination. The writer of the letter and other witnesses were summoned and carefully examined. The presiding judge of that court, in his report on the matter, says :

This witness Pedro Acevedo is the witness who, in the act of the trial, declared with the greatest straightforwardness and energy against all of the prisoners, and who stood a lengthy cross-examination and questioning, and was confronted with all of the accused, whom he recognized, making a very detailed statement of everything that took place, with such a sincerity that it was impossible to suspect that he may have been telling anything but the truth.

In my judgment, the processes of law are not to be interrupted or public confidence in judicial conclusions shaken by such documents as this. And it is doubtless true, as has been

suggested, that the witness had been worked upon by the friends, relatives and sympathizers of the accused to take this step in order to destroy the importance of the declarations made by him on the trial. I dismiss the matter as of no value and without further comment, although I have deemed it my duty to advise you of it.

The Supreme Court of Porto Rico in its decision discusses some points of law involving the construction of insular statutes. That court is the highest court in the island, and I am bound by its interpretation and construction of local laws. Moreover the learning and high character of its members are such as to require its rulings on such questions to be accepted without hesitation and with entire confidence. They would be so accepted on appeal by the Supreme Court of the United States if it followed, as I doubt not it would, its own doctrine repeatedly announced that it will adopt the construction given by a state court to the statutes of its own state. *Osborne v. Florida*, 164 U. S. 650; *Whitney v. Fox*, 166 U. S. 637, and cases cited.

Mr. Justice Hernandez however bases his dissenting opinion upon a point of law, to which it seems desirable to direct your attention because it involves the principle of paragraph 3, section 9 of article 1 of the Constitution, which provides that "No bill of attainder or *ex post facto* law shall be passed."

The question arises in this way: At the time the crime was committed by the defendants, it was provided in article 145 of the code of criminal procedure¹ that in all cases where the death penalty is demanded two additional judges shall sit, making a court of five judges. In section 153 of the same code it is provided, as a general rule for the government of all courts, whether sitting with three judges or with five, that the decisions and rulings of the courts shall be by a majority vote. After the crime was committed, the courts were reorganized under General Orders 118, series of 1899. And the Supreme Court in its construction of that enactment states in effect that by it the procedure was reformed and the requirement of five judges under article 145 definitely repealed; that a trial court of three judges was established by that law which was competent to act in all criminal cases without regard to whether the penalty of

¹ See the official translation of this code, published in October, 1901, by the Division of Insular Affairs of the War Department.

death or perpetual imprisonment was asked for or not. Under that law, as thus interpreted by our Supreme Court, a court of three judges was the only tribunal that had power to try the defendants. And it could decide all questions and assess all penalties by a majority vote.

The question therefore is, whether, the crime having been committed at a time when the law provided for a court of five judges in death cases, these defendants could lawfully be tried by a court consisting of only three judges.

So far as I know, the Supreme Court of the United States has not definitely stated that the constitutional prohibition of *ex post facto* laws is in force here as a limitation upon local legislation. And this department is not inclined to express an opinion on the question, for necessarily all such questions should be left, when possible, to the consideration of higher authorities. Moreover it is a matter of natural hesitation, as you fully understand, with one who is charged with duties in connection with the administration of the affairs of one of the newly acquired territories and who appreciates, from the standpoint of practical experience, the serious results that might arise, owing to the peculiar conditions and circumstances of the country, from the enforcement here, for the present, of the constitution in all of its parts, to rest conclusions on constitutional considerations, in advance of congressional action or of a definite announcement by the Supreme Court of the United States that the particular constitutional provision brought in question is in force here. But if the clause of the constitution relating to *ex post facto* laws is not in force here, it at least announces a principle that underlies all criminal jurisprudence; a principle that is not unknown to the Spanish system of laws and that ought, in my judgment, to be a guide for your action in this case, if it has any application. For that reason, although I do not propose to enter upon any extensive discussion of the question, it may be useful to refer you to several cases in which that clause of the constitution has been interpreted by the highest court of the land.

The common understanding of this general principle of criminal law is well expressed by Chief Justice Fuller in *Duncan v. Missouri*, 152 U. S. 377. He says, citing cases, at p. 382:

It may be said, generally speaking, that an *ex post facto* law is one which

imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage; but the prescribing of different modes of procedure and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition.

Mr. Cooley, in his treatise on Constitutional Limitations, (6th ed. 327) says:

The legislature may abolish courts and create new ones, it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.

This general doctrine has not been modified in any subsequent decision by that court, so far as I can ascertain from the law books at my disposal in this office. On the contrary, both of the above authorities, together with some others, are cited with approval in *Thompson v. Utah*, 170 U. S. 343, where the whole question is discussed at some length. In that case, it was held that a law passed by the legislature of Utah, after it became a state, substituting a jury of eight members for a jury of twelve, was an *ex post facto* law, because when the crime was committed, Utah was a territory, and under an affirmative provision of the Constitution of the United States, the defendant had a right to be tried by a jury of twelve; a right of which even the Congress of the United States could not deprive him, and which he himself could not waive.

I do not regard that case as of controlling force in the consideration of this case or as modifying the doctrine of *Duncan v. Missouri*. The constitutional character of the right claimed by Thompson and the withdrawal of that right by the state of Utah are the grounds upon which the decision is based. It is not necessarily to be inferred that the decision would have been the same had the crime been committed after Utah became a state. But however that may be, there is an obvious distinction to be made between the principle of unanimity required in a jury case, one vote being sufficient to prevent a conviction, and the principle of a majority required in decisions by courts

under the laws of Porto Rico. The weight of authority in the American decisions is in conformity with the rule announced in *Duncan v. Missouri*, *supra*. A reduction in the number of judges after the commission of an offense is not within the *ex post facto* theory of criminal law.

In his dissenting opinion, Mr. Justice Hernandez seems to deal with article 145 of the law of criminal procedure as if it required a concurrence of three votes for the imposition of the death penalty. As a mere matter of numbers, in a court of five, it is necessary in order to arrive at a majority that three votes shall concur. But the concurrence of three votes as a principle of law is not to be found in that law, and does not now exist, nor has it existed in the Spanish law since the 7th of December, 1888. Prior to that date article 153 of the law of criminal procedure required unanimity in a court of three judges in order to impose the death penalty; but as I understand the royal decree of December 7, 1888, its only purpose was to destroy the principle of unanimity and to establish the principle of a majority vote in such cases as in other cases, but because of the gravity of such cases to increase the court to five members. Section 145, as amended in 1888, contains no statement either as to a majority of votes or a concurrence of three votes. Section 153, as amended in the same decree, establishes the principle that courts, whatever their number, can act only by a majority vote. We are therefore dealing in this case, not with a principle of law, as stated by Mr. Justice Hernandez, that requires the concurrence of three votes, but with a general principle that requires a majority of votes, however the court may be constituted under the law. And that principle has remained unaltered since December 7, 1888. It was the law in force when the crime was committed and when the prisoners were tried.

There can be unanimity but no majority, in a court of one or of two judges. A majority therefore implies a court of three or more judges. And, in my judgment, whether the court is changed so as to consist of five judges or three, or changed from nine to seven judges, or otherwise, so long as the majority principle upon which its decisions are based is not changed, such alterations in numbers are not matters of substantive law affecting substantial rights; and the right to make such changes

remains in control of the legislature to be determined upon grounds of public convenience; and such changes are not in any sense obnoxious, with respect to crimes committed before the change is made, to the *ex post facto* principle of law. Such seems to be the weight of authority.

All these questions, both of fact and of law, have been carefully considered by the trial court and by the highest court in the island. They only are competent to deal with them, and in the absence of a manifest error either of fact or of law, it is the duty of the executive to accept their conclusions as final. Because however of the gravity of the matter, as well as the expression of your desire to be fully informed, I have studied the case in all of its aspects as presented upon the documents before me and have reported to you at some length. But I am not able to find upon the record any judicial error upon which to base any recommendation to you in the interest of the prisoners.

There remains therefore nothing but the question of clemency. The prisoners declare their innocence, but in the other petitions that have been addressed to you by citizens from various parts of the island, no attempt has been made to explain, excuse or qualify the brutality of the crime, beyond a reference to the disorder then existing in the island. You are simply asked to grant mercy; some of the petitioners assigning as a reason their belief that imprisonment for life is a more efficacious form of punishment; and others expressing a desire that the people may be spared the execution of the death penalty. Most of the petitioners refer to the pardoning power lodged in you under the insular constitution as a "high prerogative." Commonly understood, a prerogative means a privilege or an arbitrary power, and it is referred to by Blackstone and by some other writers as a privilege appertaining to the royal person. I take it however that in this form of government it is not a privilege pertaining to the office of the executive to be exercised by him arbitrarily; that it is not so much a prerogative as it is a duty, to be performed by the chief executive with a due appreciation of and regard for the law. In the exercise of this power, reason must be tempered with mercy and mercy with reason; but clemency should never be exercised except in deference to the law and in just recognition of its authority. If reasons exist why mercy should be shown,

the executive, as an old writer has said, carries in his breast a court of equity to soften the rigors of the law ; and he should be quick to act. If no such reasons exist, to grant mercy is to set aside and utterly to disregard the law. If it is proper for organized society to establish the death penalty, then it is as much the duty of the chief executive to require its enforcement, unless sufficient reasons exist for extending mercy, as it is his duty to carry out any other law.

Do sufficient reasons exist in this case? In its brutality the crime went beyond the common average of crimes ; and there were no extenuating circumstances. An old man without the opportunity given to defend himself, was overwhelmed under the guise of the law by a superior force that was not content with doing him to death by beating and hanging, but mutilated him as well. They then possessed themselves of his property and carried it away ; and in addition to all this they ravished a member of his household. If there could be found in this some basis for a recommendation of mercy, knowing you as I do, I am sure that it would be a matter of great gratification to you. But I have not been able to find any such fact. Upon that question however your own wisdom and high sense of justice will be a safe guide to a correct and dutiful conclusion. But there is a suggestion which I think I ought to make. One of the prisoners, Juan Torres Acevedo, is a son of another of the prisoners. He is twenty-two years of age. The father, Antonio Torres, is fifty-seven years of age. He took his son, or permitted him to accompany him on the night in question. There is the possibility that the son followed the example of the father, to whom by nature as well as by training, he may have been accustomed to yield obedience, and whose judgment he may have been accustomed to accept. It may be that he followed his father without acting upon his own judgment. I admit that this is not an excuse for the participation by the son in this crime ; it does not relieve him from legal responsibility ; but it may afford some slight explanation. It is unusual for a father and son to be companions in crime, and, anxious as I am to find grounds for mercy in this case, I am willing to believe that this young man was not altogether a free agent on that occasion, acting upon his own incentive and following his own criminal impulses.

I therefore recommend that the penalty of death pronounced by the District Court of Ponce against Juan Torres Acevedo be commuted to chain for life.¹ As to the other prisoners, I recommend that the petitions be denied and that the law be permitted to take its course.²

I have the honor, sir, to be, your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

THE FOLLOWING PERSONAL HISTORY OF THE PRISONERS ACCOMPANIED THE REPORT.

BERNABE ACEVEDO PEREZ is a native and, when he committed the crime in question, was a resident of Adjuntas. He is the son of a farmer and so far as is known had no penal antecedents. He is now about thirty-two years of age. Although he was a married man with a family of children, he was one of the two men that criminally assaulted Theresa Garcia on the night of the murder. He is able to read and write.

JOSÉ TORRES ALER was a native of Yabucoa, and at the time of his crime was a resident of Adjuntas. He is also the son of a farmer, but he can neither read nor write. He is about forty years of age, and before his imprisonment lived with a mistress by whom he had five children. He has no penal antecedents so far as I have been advised. Besides participating in responsibility for the death of Antonio Delgado y Delpino, he is the other defendant who, on the night in question, was guilty of a criminal assault upon the same woman.

ANTONIO TORRES was a native and, at the time of his crime, a resident of Adjuntas. He is the illegitimate son of a farmer. He can neither read nor write. He has no penal antecedents so far as I have been advised. He is married and has a family of children, the eldest of whom is a son, Juan Torres Acevedo, who was his companion in crime on the night in question. He is fifty-seven years of age.

¹ A form of punishment prescribed in the Spanish law then in force in Porto Rico. In actual practice, at least since the American occupation, it seems to have meant nothing more than imprisonment for life.

² The governor having acted in accordance with the recommendation, the four condemned prisoners were subsequently executed.

JUAN TORRES ACEVEDO was born at Lares, but was a resident of Adjuntas at the time of the crime. He is about twenty-two years of age, and can read and write. He is single. He has no penal antecedents, so far as I have been advised. He is the son of Antonio Torres above mentioned.

RAMON TROCHE CADENO is the youngest of the prisoners. He cannot read or write and is said by the director of prisons to have been nineteen years of age on the 6th of January, 1900. If this is true, he was about eighteen years of age at the time of committing the crime in question. He seems however to be a man of criminal tendencies, and to have come from a family that has the same characteristics. Although still a young man, besides being under sentence of death by an insular court for participation in this crime, he has also been sentenced by the United States Provisional Court for another murder, and is now in prison under that sentence for the term of his natural life. I have before me only a copy of the information in the second case. It shows that he, with three other companions in crime, deliberately cut the throat of one Jacinta Sansot, a Frenchman residing at Adjuntas. His brother Balbino and his cousin Pascual were both sentenced for the same crime to imprisonment at hard labor for their natural lives, the former by the United States Provisional Court, and the latter, captured later, by the United States District Court. He has a cousin, Luis by name, now undergoing a term of eleven years for robbery; another cousin by the name of Francisco sentenced by the District Court of Ponce for the same crime; another cousin by the name of Medina was sentenced by the District Court of Arecibo to a term of three years, nine months and five days for the crime of robbery.

DELINQUENT TAXES.

Section 49 of the revenue law of Porto Rico, relates to taxes owing by delinquents to The People of Porto Rico, and clearly includes any taxes so owing, whether for the year following the passage of the law or for prior years. To hold that it covers taxes only for present and the preceding fiscal year is to read into the law that which does not there in terms appear.

TREASURER: Requests a ruling with respect to sections 49, 50 and 51 of the internal revenue law, approved January 31, 1901, and states that the registrar of Caguas has refused to record an attachment under section 51 without the payment of registrar's fees and the affixing of stamps required on other documents issued by registrars. The theory of the registrar is that the revenue act refers only to delinquents of the year 1901-1902 and subsequent years, and does not relate to delinquent taxes of prior years.

[1st endorsement:] Office of the Attorney-General, *May 2, 1902*. Respectfully returned to the Treasurer of Porto Rico. The registrar of property of Caguas is in error in his view of this matter. Sections 49, 50 and 51 of the revenue law of 1901 as amended refer to all delinquent taxes, without any limit as to the year in which such delinquency occurs. That law, like many others that have been passed, deals with the situation as it existed. To say that it covers only taxes for that and subsequent fiscal years is to read into the law what does not appear there in its terms. Section 49 refers to taxes owing by delinquents to The People of Porto Rico. Clearly this refers to any taxes, whether for that or prior years, for which, at the time the act was passed, the delinquent might be indebted to the government. It is the duty of the registrar in the case in question and in similar cases to take the steps required by section 51 of that act without charging a fee or requiring the affixing of revenue stamps. JAMES S. HARLAN.

CANCELLATION OF CENSOS—JURISDICTION OF TREASURER AND SECRETARY.

If the amount to be paid for the redemption of a censo is fixed by the terms of the original papers or by law, its redemption at that amount is purely a ministerial act within the jurisdiction of the Secretary; if, however, the amount is not so fixed but must be ascertained, the matter would seem to come within the jurisdiction of the Treasurer of Porto Rico.

A reduction of 10 per cent in the sum to be paid for the redemption of the censo in question amounts simply to a gift of one hundred dollars to a particular church. Such a gift is without authority of law, and its unlawful character will leave a cloud upon the title.

OFFICE OF THE ATTORNEY-GENERAL,

May 3, 1902.

SIR: I have the honor to return herewith the communication of Herminio Diaz, dated April 1, enclosing a proposed cancellation of a censo in favor of the Reverend James H. Van Buren, which was addressed by you to me yesterday for examination. I also enclose some other papers upon which I have already expressed an opinion and which were returned to me for a reconsideration of the question in connection with a memorandum prepared for that purpose by your law clerk.

I adhere to the conclusions expressed on this general question in my communication to you of March 8. Those conclusions restated are, that, under General Orders 102, series of 1900, the distribution between the Secretary and the Treasurer of Porto Rico of the powers formerly exercised by the Diputacion Provincial is effected in language of such character as to require me to draw a close distinction between the respective jurisdictions of the Secretary and the Treasurer in the matter of authorizing registrars of property to annul municipal censos. That distinction is as follows:

If the amount to be paid for the redemption of a censo or mortgage or any other lien held on real property by a municipality, is fixed either in the mortgage or under the original papers relating to the censo or lien, or is fixed by law, its redemption at that amount is purely a ministerial act and authority to annul it is clearly within the competency of the Secretary of Porto Rico.

If however there is any dispute as to the amount due to the municipality upon the redemption of such censo, mortgage or

other lien, the matter would seem to come within the jurisdiction of the Treasurer. The papers enclosed present an instance of this kind. They show that a negotiation has been going on between the municipality and Dr. Van Buren as to the amount to be paid to redeem the property in question. If that negotiation were based upon a dispute as to the amount due, or if an adjustment of accounts were needed, or if for any other reason this amount was unsettled and had to be ascertained and liquidated by negotiation, it is quite clear that the Treasurer of Porto Rico, having under the law the authority to investigate municipal accounts and to intervene in its financial affairs, would be the only official competent, under the General Order mentioned, to intervene in the matter. Under the law, he has access to municipal accounts and books and archives, and thus is able legally to ascertain the history of any particular censo or other lien. Moreover his department is specially equipped for dealing with questions of values, accounts, etc. This would be especially true in case of a dispute between the parties as to the amount due under a censo.

I am of the opinion however that the Secretary in this particular case may act, and that his action should be a refusal to authorize the cancellation of the censo. It appears on the enclosed documents that there is no dispute involved, but that the municipality purposes to grant a reduction of ten per cent in the amount of the lien. I find no authority in law for this action. It amounts simply to a gift of one hundred dollars of municipal funds to a particular church. I have been unable to find any authority for such an appropriation. Moreover even if the annulment were authorized by you, the unlawful character of the transaction is such as, in my judgment, will still leave a cloud upon the title. The only safe course for Dr. Van Buren to pursue is to pay the full amount due to the municipality.¹ This will relieve the property from any possible complication. Any other course would not.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

¹ Subsequent developments showed that Dr. Van Buren had no other thought in mind than the full payment of the amount due and that the suggestion of a reduction had been gratuitously made by others because the property was intended for religious purposes.

HARBOR RULES AND REGULATIONS.

There is no conflict of a substantial nature between the duties of the Captain of the Port, as set forth in the harbor rules and regulations of the insular government, and the rights and duties of the Collector of Customs as they appear in federal statutes. The Collector of Customs has no authority in law to give orders to the chief pilot of the port, the pilot being an insular officer controlled by insular authorities.

OFFICE OF THE ATTORNEY-GENERAL,

May 8, 1902.

SIR: In connection with the rules and regulations for the ports and harbors of the island adopted under the authority of an act of the Legislative Assembly by the Executive Council of Porto Rico, and your pencil annotations on the margin thereof, I have studied with some care the compilation of the navigation laws of the United States and the volume of customs regulations, both published by the authority of the treasury department at the government printing office in 1899, which you were good enough to leave with me for that purpose. I have been unable either in these volumes or in the statutes of the United States, which I have also examined, to find any conflict of a substantial nature between the duties of the captain of the port, as set forth in the harbor rules and regulations, and the rights and duties of the collector of customs, as they appear in the federal statutes and in the regulations above mentioned. I infer from this either that there is a wide difference between us in the interpretation of these laws or that there are some statutes and laws with which I am not familiar and to which you have not called my attention. As an illustration of this wide difference, I call your attention to a letter just received from the captain of the port, in which he advises me that you have notified the chief pilot of the harbor not to receive instructions from him; that you have stated to the chief pilot that the captain of the port has no authority to direct the moving of vessels from one berth to another; and that in fact he has nothing to do with vessels in the harbor, but that those duties pertain to your office. Upon an examination of the navigation laws of the United States, as compiled by the treasury department, I have not

been able to find the slightest authority in law for this action on your part. On the contrary, part ten of the volume (p. 133) entitled "General Pilot Laws," indicates with the utmost clearness that pilots are regulated in conformity with state laws, that the federal officials have no authority or control over them, except in the mere matter of issuing licenses to pilots of steam vessels.

In giving the order to the chief pilot, if the captain of the port is correctly advised, you must have acted upon some provision to be found in the law. And on behalf of the Judiciary Committee, which has the whole matter under consideration, I again invite you to suggest in writing the source of your authority for taking that action, and of the verbal statement that you have made to me to the effect that the pilots of the harbor are under your authority. My understanding is that you have no authority whatever in the premises.

I have before me part seven of a publication also issued by the treasury department entitled "United States Coast Pilot, Atlantic Coast," in which are set forth extracts from the laws of several of the southeastern states bordering upon the Atlantic ocean. From an examination of these laws, it is clear that in those states the question of pilots and their fees, and the question of giving berths to ships at wharves and moving them about from place to place rest upon the authority of state statutes and is controlled by state officials. In fact, nearly all of the provisions in the harbor rules and regulations for Porto Rico, to which you object are found in substance in the laws of these states, as they are set forth in this government publication. Moreover, the rules and regulations for the ports and harbors of Porto Rico, as I am informed, were compiled by the Commissioner of the Interior from the rules and regulations for the harbors of New York, New Orleans, Philadelphia, and other prominent points.

I understood from you the other day that you claimed in substance the right to shift vessels from one place to another, and deny the authority of the captain of the port to do so; and your annotations on the copy of the rules and regulations which you left with me indicate that you deny his authority in respect to many of them, and are of the opinion that that authority belongs to you. You may be right about this mat-

ter, for I have not had occasion to make an exhaustive study of these questions, nor have I had any experience in such matters. Moreover, I have not been able to devote much time to an examination of the authorities. But in view of your positive expressions on the question, you will doubtless be able to refer me to the laws upon which they are based. The references you have already made do not seem to touch the question at all.

As the Judiciary Committee has all of these matters under consideration and desires at once to reach a conclusion and report to the Executive Council, I invite you again to present your suggestions in writing. I need not assure you that the members of that committee, as well as all the officers of the government, desire in every way to respect the authority of all other federal officers in the island, and will co-operate in every way possible in the performance of their public duties. It is essential, however, that the proper policing of the harbor shall not longer be delayed, and some plan of action consistent with law must be adopted and put in force at once, subject, of course, in every way to the authority of the federal laws and of federal officers.

I therefore request that you will let us hear from you at once in writing. In no other way can the matter be satisfactorily considered by the committee.

Very respectfully,

JAMES S. HARLAN.

THE COLLECTOR OF CUSTOMS.

CLAIM AGAINST THE INSULAR GOVERNMENT.

The insular government is under no liability to reimburse the owner of a house built upon insular property and which was destroyed by the hurricane. The mere fact that the insular government, finding such a building on insular property, took possession of it and that it was destroyed by a hurricane while so in its possession, does not either in law or in equity require the insular government to pay its value to the owner.

OFFICE OF THE ATTORNEY-GENERAL,

May 12, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of April 26, enclosing certain papers, herewith returned, relating to the claim of José García Perez against the insular government in connection with a certain building which formerly stood in the marina district of the Capital, and which appears to have been destroyed by the cyclone of August 8, 1899.

I have not had time to study the papers exhaustively, but from such examination as I have made, I am impressed with the thought that Mr. García makes no showing of title to the house that can for a moment be accepted even as a basis of negotiation, or any title sufficient to warrant him in asking for a consideration of his claim by any department of government. Nor does he make any showing of the right and authority of his grantor to make a sale of the building. That being the case, it does not seem necessary to enter upon a discussion of the legal questions involved.

For your information however and in order that you may be more fully advised in case you should desire to pursue the matter further, it may be well to inform you of certain facts that do not clearly appear upon the enclosed document.

On the 29th of June, 1899, the military authorities went into possession of the house in question and used it for the storage of tools. They found the house situated on insular property, and being attached to the freehold it was clearly the duty of the public authorities to take possession of it and in the public interest to retain possession of it until properly advised that the title to it had passed into private hands.

There is sufficient evidence that whatever claim Mr. García

had acquired was held by him for speculative purposes. He made no strong objection to the course of the government in taking possession. On the contrary, the records of this office show that on the 13th of July, 1899, in a communication addressed to the Director of Public Works, the claimant offered the building to the government for the sum of five hundred pesos provincial money. The original document is in this office and the fact should be borne in mind, not only because it fixes Mr. García's estimate of the value of the building at that time, but because it shows that he was making no strenuous objection to the possession of the building by the government, and that he was making no demand for its immediate restoration to him, but that on the contrary, he was permitting the government to stay in possession while he carried on a negotiation with one of the departments for its sale to the government.

Upon the receipt of his communication, an investigation as to the character of the title of Mr. García was instituted and went forward with commendable promptness, the Solicitor General making a report to the Judicial Board on the seventeenth of August. I do not understand from its terms that this report was intended as a final announcement by the law officer of the government upon the questions involved, but that it was a mere suggestion of the legal aspects of the case if the facts as stated by Mr. García were found to be true. The conclusion reached in substance was that if the house had been lawfully sold to Mr. García by any person having the authority to sell it, the insular government could not continue to keep it without paying rent to the owner. This report was dated however nearly ten days after the house had been destroyed by the hurricane.

These facts are of importance in the consideration of the proposition announced by the law clerk of your office that the government is responsible to Mr. García for rent from the time it took possession of the house to this date, notwithstanding the fact that the house was destroyed by an act of God. I am wholly unable to concur in this suggestion. If such a legal liability attached at all, it may well be asked: When will it end? Moreover I am of the opinion that the government cannot be called upon to pay for its value at the time of its destruc-

tion by the hurricane, even if it be assumed that the house had been severed from the freehold and that the title to it had lawfully passed to Mr. García. It rested on public land. There is no claim that the government exercised bad faith in taking possession of it. Moreover there is no showing by Mr. García either of an intention or of the expression to the public authorities of his intention to remove it, or any showing that he had made any plans to remove it. On the contrary, the record before me shows that it remained on public land and in the possession of the government with the tacit consent of Mr. García and in order that he might carry on the negotiation with the government for its sale. In good faith the government instituted an investigation as to his claim, doubtless with the idea of making a settlement with Mr. García if found to be a just claim. While engaged in this, the house was destroyed by the overwhelming force of the elements. Under these circumstances, to hold the government responsible is, in my judgment, out of the question. I recommend that Mr. García be advised that his claim will not be further considered.

On September 8, 1900, there were forwarded to you by the Attorney-General certain papers in connection with this matter which may be useful to you.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

OFFICIAL LANGUAGE IN THE ISLAND.

English is the official language of the legislative assembly, and the English copy of bills passed by that body are the laws of the island.

Until July 1, 1902, Spanish is the official language in the supreme and district courts. After that date both Spanish and English may be used in those courts.

In the municipal and police courts, as well as in the municipal offices, Spanish is the official language until the legislature shall determine otherwise. Both Spanish and English may be used in the offices of notaries and registrars of property and in the several departments of government.

The commander of the district of Porto Rico requests to be informed as to what is considered the official language of the island.

[1st endorsement:] Exécutive Mansion, May 17, 1902. Respectfully referred to the Attorney-General, asking whether he has ever had occasion to consider this matter. W. H. HUNT, Governor.

[2d endorsement:] Office of the Attorney-General, *May 21, 1902*. Respectfully returned to the Governor of Porto Rico. I have not heretofore considered this matter, but from my examination of existing laws since the receipt of this reference I have arrived at the following conclusions: 1. English is the official language of the legislative assembly with respect to legislation; the enactments by that body in English are the laws of the island. 2. Until July 1 next Spanish is the official language in all insular courts. After that date Spanish and English are both official languages in all insular courts except the municipal and police courts. 3. In the municipal offices as well as in the municipal and police courts, Spanish is now the official language, and will continue so until the legislature shall determine otherwise. 4. Both Spanish and English are now official languages in the offices of notaries and of registrars of property. 5. In the several departments of the government, both languages of necessity have been used as official languages, and both Spanish and English are recognized by law as official in all insular offices after July 1 next. JAMES S. HARLAN.

SELLING BREAD UNDER WEIGHT.

Bakers who persistently make and sell bread that is under lawful weight reap an advantage which common honesty as well as the law forbid. A baker who intends to deal fairly and honestly with the public by the use of reasonable care will have no difficulty in avoiding the courts.

Garcia Arias, Yndalecio, desires to know whether a difference of five to ten grammes in the weight of bread would render the person selling the same liable to the penalties imposed by law for selling short weight bread.

[1st endorsement:] Secretary's Office, May 19, 1902. Respectfully referred to the Attorney-General.

• CHARLES HARTZELL.

[2d endorsement:] Office of the Attorney-General, *May 22, 1902*. Respectfully returned to the Secretary of Porto Rico, Circular number 156 of March 7, 1900, provides in article one that bread offered for public sale must be in loaves of 100, 200 and 400 grammes. The question propounded by your correspondent is whether a shortage in the weight of bread sold of from five to ten grammes would render the baker liable to the penalty imposed by law in that connection. It is difficult to answer satisfactorily a question of this nature. Bakers that persistently make and sell bread that is underweight reap an advantage which common honesty as well as the law forbid. A single case of underweight bread may be due to an inadvertence or carelessness, but it is not difficult for a baker to weigh his bread and sell it according to its weight; if under the lawful weight, he can moderate his price accordingly. A baker who intends to deal fairly and honestly with the public in selling the product of his labor will have no difficulty, by the use of reasonable care, in avoiding the courts. JAMES S. HARLAN.

LAW OF RAILROADS.

The law of railroads, as set forth in the royal decree of December 9, 1887, as well as the police regulations for its application of February 17, 1888, are still in force so far as they do not modify the power of the Executive Council, contained in the organic act, to grant franchises, privileges and concessions.

The jurisdiction under the police law of railroads is lodged in the Commissioner of the Interior, and is to be enforced by him through the board of public works, subject to the intervention of the Governor, as set forth in the law.

The question of tariff schedules for railroads in the case of ordinances granted since the date of the organic act is controlled by the terms of the respective ordinances.

OFFICE OF THE ATTORNEY-GENERAL,

May 28, 1902.

SIR: I have carefully examined the war department translation of the law of railroads of the island of Porto Rico, embodied in the Royal Decree of December 9, 1887; as well as the translation of the police law of railroads and regulations for its application of February 17, 1888.

Although your reference does not call for an opinion in relation to the former law, it may be well to say that, in my judgment, it may be considered as still in force concurrently with and subordinate to the power lodged by the organic act in the Executive Council to grant franchises, privileges and concessions; or at least in force so far as it does not modify that power, and as a guide to be followed at the discretion of the Executive Council in exercising the broad jurisdiction conferred upon it under the insular constitution.

In the absence of a specific law to that effect, the police power is never to be regarded as having been repealed. By police power, I refer to the various duties, powers and privileges commonly exercised by all governments under the authority of law for the protection of the public welfare, health and safety. And therefore the general police powers, as set forth in the Spanish laws applicable to Porto Rico are fully preserved, except in so far as they have been expressly repealed, modified or amended by subsequent laws. The police control by the state over railroads is of special importance in that it touches not only the public convenience but the public safety.

And I do not find that that control, as established in the police law of railroads, has been repealed by any express enactment. I am of the opinion therefore that it is still in force, and that the jurisdiction under it is lodged in the Commissioner of the Interior, to be exercised by him through the board of public works, subject to the intervention of the Governor, as set forth in the law.

The question of tariff schedules is controlled in the case of ordinances granted since the date of the organic act by the terms of the respective ordinances. I have not examined the police law of railroads in great detail, and in some other respects its terms may have to be considered as modified by the general power of the Executive Council to grant franchises. Generally speaking however and except as thus modified it is still in force.

Very respectfully,

JAMES S. HARLAN.

The COMMISSIONER OF THE INTERIOR.

PERSONS CONDEMNED UNDER FORMER LAW NOT ENTITLED TO
RE-TRIAL BY A JURY.

The five prisoners under sentence of death in the Ponce jail, having been tried and sentenced by a court of judges in accordance with the law then in force, are not now entitled to a jury trial under a subsequent jury procedure act. That act provides a method of ascertaining the guilt or innocence of persons accused of crime, and not for hearing causes already heard.

OFFICE OF THE ATTORNEY-GENERAL,

June 2, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of May 29, written in your capacity as the professional adviser and attorney of the four prisoners under sentence of death in the Ponce jail.

Upon the theory that a jury trial is more advantageous to accused persons than a trial by a court of judges, and in view of the general principle in Spanish jurisprudence that a subsequent law more favorable than a former law must accrue to the benefit even of prisoners condemned, you assert that your clients are now entitled to a jury trial.

I am not able to acquiesce in this opinion, and I do not hesi-

tate to affirm my belief that neither in the American nor in the Spanish jurisprudence, nor in the jurisprudence of any other enlightened nation, will you be able to find a single case where a subsequent change in the procedure for the trial of men accused of crime has been held to give to prisoners already condemned the right to a new trial. This theory, if made effective, would give to every man now confined in the presidio a right to a new trial before a jury.

The jury procedure act of 1901 has no application to the case in question. That act is a law of procedure for ascertaining the guilt or innocence of persons accused of crime, and not for the hearing of cases already heard.

Very respectfully yours,

JAMES S. HARLAN.

MR. LUIS LLORENS TORRES.

THE MUNICIPALITY OF CULEBRA.

The act for the consolidation of certain municipal districts of Porto Rico, approved March 1, 1902, cannot be made effective with respect to that clause which requires the island of Culebra to be annexed to the municipal district of the island of Vieques. The island of Culebra is not a municipality and has no municipal officers, but is under the control of a Governor's delegate. And as the act in question contains no adequate provisions for carrying it into effect with respect to the island of Culebra, its political condition is not affected thereby and the Governor's delegate still has authority to administer its affairs.

OFFICE OF THE ATTORNEY-GENERAL,

June 11, 1902.

SIR: I have the honor to acknowledge the receipt, under the endorsement of the Secretary of Porto Rico, of a communication to you of the 23d of May from the Governor's delegate in the island of Culebra, with respect to the turning over of certain public property to the municipality of Vieques under the terms of an act entitled, "An act for the consolidation of certain municipal districts of Porto Rico," approved March 1, 1902.

A careful consideration of the terms of that enactment will show that it cannot be made effective with respect to the clause

that requires the island of Culebra to be annexed to the municipal district of the island of Vieques, no adequate provisions to that effect having been made by the legislature. In every paragraph of the act, provision is made for the annexation of one municipality to another, and for the abolition of the offices of the abolished municipalities and the transfer of their municipal duties to the municipal officers of the greater municipal district. There are provisions also for the turning over to the greater municipal district of the public property of the abolished municipality. The island of Culebra however is not a municipality; it has no municipal offices, nor any municipal property. It is governed by a Governor's delegate, and most of the public buildings and public property existing on the island seem to have been erected out of insular funds upon lands belonging to the insular government. The act contains no provision to abolish the Governor's delegate or to withdraw from him the duties now required of him by law. It contains no provision for turning over the insular property in the island to the municipality of Vieques or to any other municipal district. In other words the act wholly fails to contain provisions adequate and necessary for carrying it into effect with respect to the island of Culebra.

I am therefore of the opinion that the island must continue to be administered under your authority by a delegate in accordance with the laws now existing until the legislative assembly of Porto Rico shall have made provisions for its government in some other manner.

If you concur in these views it may be well to give immediate notice to the Secretary and to the Treasurer, as both departments are doubtless making their dispositions in respect to Culebra under the act in question. You will know whether the Auditor and Commissioner of the Interior will also require notice.

I have the honor, sir, to be your obedient servant,
JAMES S. HARLAN.

The GOVERNOR.

MUNICIPAL FUNDS NOT SUBJECT TO GARNISHMENT.

Funds collected by the Treasurer of the island under the authority of law for general municipal purposes are impressed with a trust for those purposes and must be applied to the support of the municipal government for which they were collected. They cannot be diverted by process of garnishment.

A person having a claim against a municipality which has been reduced to judgment may compel its payment by the municipality only in the manner provided by law.

OFFICE OF THE ATTORNEY-GENERAL,

June 13, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of to-day, enclosing a summons to you as garnishee in the case of *Benjamin J. Horton v. The Municipality of Aguadilla*, pending in the District Court of the United States for Porto Rico, and requesting my advice in the premises.

It is the common understanding among legal writers that a municipal government is nothing more or less than the hand of the central government guiding and directing, according to law, the affairs of a particular locality. The only object of the creation of municipal corporations is that they may act as the administrative agents of the state for urban communities, and provide for a more exact local government than the central authorities could give to them. With this end in view municipal governments enjoy the power of taxation for local purposes; and to them and to the local officials are assigned certain political and civil duties, which, within limitations, are common to all municipalities under whatever sovereignty they may exist.

Being an instrument of the state for local government, they must not be deprived by a court of the opportunity of carrying out the public purposes for which they are formed. A learned writer has said:

Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed and the ends of its erection thwarted. Based upon considerations of this character, it is the settled doctrine of the law that not only the public property, but also the taxes and public revenues of such corporations, cannot be seized under execution against them, either in the treasury or in transit to it. *Dillon's Municipal Corporations*, 100.

The funds in your hands were raised under special authority

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of law for general municipal purposes. They are impressed with a trust in order that those purposes may be carried out, and they cannot be diverted from those purposes by process of this kind. To state it in another way, I am of the opinion that in the absence of a special statute on the question, the funds in your hands belonging to the municipality in question cannot be seized on process of garnishment.

There are several other suggestions of a legal nature that may be made, but I will not burden you with them at this time. I will add however that I know of no authority for issuing such a writ out of the District Court of the United States for Porto Rico, for garnishment is not a common law action. And in any event it does not seem to be available in a suit against a municipality, in view of the fact that the local law contains adequate provisions for compelling the payment by a municipality of a claim against it which has been reduced to judgment. I will take the proper action in the matter and further proceedings in the case will be looked after in this office.

Very respectfully,

JAMES S. HARLAN.

The TREASURER.

SUPERIOR BOARD OF HEALTH—LOCAL HEALTH AUTHORITIES.

Under the act providing for the appointment of a director of health the legislature gave to the superior board of health paramount control of the sanitary affairs in the island.

Construing the act in all of its parts it is apparent that the effect of the proviso at the end of section 12 is to put the local boards of health under the direct supervision and administration of the central body, and to subject the local officials in all sanitary matters to the direction of the superior board.

OFFICE OF THE ATTORNEY-GENERAL,

June 25, 1902.

SIR: In your communication of the 18th, you ask for an interpretation of a proviso at the end of section 12 of an act entitled, "An Act to provide for the appointment of a director of health, defining his duties as such, and establishing a Superior Board of Health, and for other purposes," approved

March 1, 1902; and you state that by some the opinion is entertained that the result of this proviso is to transfer to the local board of health the performance of all of the duties set forth in sections 6, 7, 8, 9, 10, 11, and 12 of the said act.

It is apparent from an examination of the act that the Superior Board of Health was intended by the legislature to have paramount control of sanitary matters in this island. In a small country so densely populated, inattention in health matters in one municipality may immediately affect and endanger the health of the residents of another municipality. The necessity therefore of a strong insular body is apparent and finds expression, in my judgment, in the act in question. With this end in view the legislature, under sections 6, 7, 8, 9, 10, 11, and 12, has delegated to the insular board certain duties and powers. It is said that these powers having been granted to the insular board, the effect of the proviso in question is to take them away again. I do not think that the proviso will bear such an interpretation.

The several sections mentioned in the proviso contain the following provisions: Section 6 requires the superior board to make sanitary investigations and inquiries concerning the cause of sickness; section 8 requires it to frame and publish rules and regulations for the public hygiene; section 9 requires the approval by the board of plans for water supplies, drainage and sewerage; and section 10 requires the board to establish rules for the admission of persons to the practice of medicine, surgery, etc. Does the proviso mean that all these very important duties shall not be performed by that board, but by the local board? Are the powers delegated immediately withdrawn, leaving to the insular body nothing but ineffective and nominal functions?

Clearly none of these things was intended. On the contrary, considering the act in all its parts, the only conclusion that can be deduced from the proviso is that the local boards of health are put under the direct supervision and administration of the Superior Board of Health, and that they are made a part of the insular body, subject in all matters mentioned in the act to the direction, supervision and orders of the superior board. This interpretation is supported and strengthened by section 47 of the act entitled, "An Act concerning municipali-

ties," approved March 1, 1901, where it is provided that the local health officer shall "perform all such further duties as may be further imposed upon him by law or by regulations of the Superior Board of Health."

After careful study of the act, I am of the opinion that the effect of the proviso is to give the Superior Board of Health the right, in carrying out the powers conferred upon the insular board in sections 6, 7, 8, 9, 10, 11, and 12, to make use of the local health officials as well as their own insular inspectors, and to require the local health officials to look to it for instructions and orders and to obey such instructions and orders upon their official responsibility.

Very respectfully yours,

JAMES S. HARLAN.

The PRESIDENT OF THE SUPERIOR BOARD OF HEALTH.

CLERKS OF CIVIL REGISTERS—HOW APPOINTED.

The right of municipal judges to appoint clerks of the civil register for the proper keeping of which the municipal judges are still officially responsible has not been repealed by the new municipal law; and the salaries of such clerks are still properly chargeable to the municipal budgets.

Alcalde of Juana Diaz requests information as to whether the alcalde or municipal judge can appoint the officials in charge of the civil register.

[1st endorsement:] Office of the Treasurer, June 17, 1902. Respectfully forwarded to the Secretary of Porto Rico. WILLIAM F. WILLOUGHBY.

[2d endorsement:] Secretary's Office, June 19, 1902. Respectfully referred to the Honorable Attorney-General for his opinion. CHAS. HARTZELL.

[3d endorsement:] Office of the Attorney-General, *June 26, 1902*. Respectfully returned to the Secretary of Porto Rico. I have been unable to find any section of the municipal law that takes away from the municipal judges the power specifically given to them under the law formerly in force to appoint

a clerk of the civil register, for the proper keeping of which the municipal judges are still officially responsible.

I am of the opinion also that the salary of the clerk of the civil register under the new law still continues to be a charge upon the municipal budget. The general provisions in the new enactment cannot alter or supersede the specific provisions formerly in force.

The foregoing observations are limited to municipalities that have not been abolished by recent law. With respect to municipalities that cease to exist after the first of July, the law provides that the civil register shall be in charge of a commissioner appointed by the alcalde of the consolidated town.

JAMES S. HARLAN.

FOREIGN CLERGYMEN—RIGHT TO CELEBRATE MARRIAGE.

Article 148 of the new civil code does not exclude priests and ministers of countries other than Porto Rico and the United States from the right to perform the marriage ceremony in the island.

OFFICE OF THE ATTORNEY-GENERAL,

June 26, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of this date, in which you invite my attention to article 148 of the new civil code:

Any clergyman or minister of any religion or sect, whether a citizen of Porto Rico or of the United States, may solemnize marriages in Porto Rico whenever a license has been issued in the manner herein provided.

The question which you propound is whether the phrase, "whether a citizen of Porto Rico or of the United States," has the effect of excluding clergymen, priests and ministers of other countries from solemnizing marriages in Porto Rico.

I am of the opinion that the clause does not bear such an interpretation. The intention of the clause is to emphasize the principle that in order to entitle a priest or minister to solemnize marriage it shall not be necessary that he be a citizen of Porto Rico. I regard the clause as explanatory of this principle, and not as excluding priests and ministers of countries other

164 *Slaughtered Cattle — United States Inspection Certificates.*

than Porto Rico and the United States from the right to perform the marriage ceremony in this island.

Very respectfully,

JAMES S. HARLAN.

Reverend PEDRO MARIA BERRIOS.

SLAUGHTERED CATTLE—UNITED STATES INSPECTION
CERTIFICATES.

Certificates issued under the authority of the agricultural department of the United States must be accepted by the local inspection authorities, when they accompany refrigerated beef imported into Porto Rico, as sufficient evidence that the animals slaughtered were fit to be slaughtered and that sanitary conditions were complied with.

Whether such beef on arrival or at the time it is offered for sale is in a fit state for consumption is a matter that may be inquired into by the local authorities.

OFFICE OF THE ATTORNEY-GENERAL,

July 5, 1902.

SIR: In reply to your communication of the 26th of June, I have the honor to say that inspection certificates issued under the authority of the Agricultural Department of the United States must be accepted by the local inspection authorities, when they accompany refrigerated beef imported into the Island of Porto Rico, as sufficient evidence that sanitary conditions were complied with in the slaughter of such beef, and as sufficient evidence that the animals so slaughtered were fit to be slaughtered. Whether the beef on arrival or at the time it is offered for sale is in a fit state for consumption, is a matter that may be inquired into by the local inspection authorities, for which inspection they are entitled to reasonable fees not exceeding the amount provided by law. In case the local inspection authorities exceed their powers in making this local inspection or demand unreasonable fees, you have the right of appeal to the proper administrative authorities for redress.

Very respectfully,

JAMES S. HARLAN.

GEORGE H. SALDANA, Esquire.

AUTOPSY FEES.

The legislative assembly having provided that no claim for medical autopsies performed between July 1, 1899, and July 1, 1902, shall be paid except upon the approval of the Attorney-General, who is required to demand legal proof of the performance of the autopsy and to estimate the value of the services rendered, *Held*, that the usual certificate of the judge under whose authority such an autopsy was performed is not sufficient authority to prove the performance or the value of the services.

Inasmuch as the new act in relation to autopsy fees fixes the basis of compensation for autopsies performed after the act went into effect, it is proper for the Attorney-General to adopt that basis in making compensation for autopsies performed prior thereto.

OFFICE OF THE ATTORNEY-GENERAL,

July 6, 1902.

SIR: I have your letter of the 5th, which I have read with great care. It sets forth clearly your point of view in the matter of autopsies, but I am not able to agree with you, and for that reason I deem it my duty, as well as a pleasure, to explain to you fully the rule which has been adopted in the department for the adjustment of these claims.

The legislative assembly at its recent session passed a deficiency appropriation for the payment of claims for medical autopsies performed between July 1, 1899, and July 1, 1902; but it provided that no claim should be paid except upon the approval of the Attorney-General, who is required by the act to demand sufficient legal proof of the rendition of the services and to estimate the value of the services rendered. These claims can therefore be paid by me only upon compliance with the special terms of the law making the appropriation. Instead of permitting me to accept the usual certificate of the judge under whose authority the autopsies were performed as sufficient evidence both of the rendition of the services and of the value thereof, I am required by the law to take up the matter anew. And so this department, in the adjustment of these claims, has been compelled to make an investigation of each case, taking steps in addition to the signature of the judge, to ascertain whether the services were performed and to fix the compensation therefor. The terms of the law leave to the Attorney-General no other course, as I think you will agree after reading it over with the same care with which I have studied it.

It is true as you very correctly state that laws have no retroactive effect; but this rule has no application to this matter. The legislature has agreed to pay these claims upon certain conditions, and the claimants are left to choose whether they will accept payment under those conditions or not. One of these conditions is that I shall ascertain the value of the services. It is obvious that in order to do this I must adopt some rule of general application. And although I am not bound by the act of February 26, 1902, which fixes the compensation for future autopsies, nevertheless, as the legislature has expressed its opinion upon the question so conclusively, I have to some extent adopted the legislative opinion as a guide for my own action in connection with the claims for past services. As that act sets the legal estimate of the value of such services for the future, it would be unbecoming in me wholly to ignore it in reaching an estimate of value for the past.

I have the highest respect for the medical profession. Indeed it seems to me that that profession has, during the past few years, made more advance for the world's good than any other profession. I also feel that in many cases the fees allowed by law may not be a sufficient compensation; but, like lawyers, physicians are to some extent public servants, and neither lawyers nor physicians in many cases are adequately compensated.

I hope that upon full reflection you will see that no other course is open to this department than the one that has been adopted.

Very respectfully,

JAMES S. HARLAN.

DR. FRANCISCO SEIN.

THE NEW MUNICIPAL LAW.

An act entitled "An Act concerning Municipalities," approved March 1, 1902, construed and held to be now effective in all of its parts, the present officials to be utilized to carry out its provisions until the general municipal elections.

The new municipal law provides for the distribution of municipal powers and functions between legislative and executive branches. It is therefore no longer competent for the *alcaldes* to preside at the meetings of the municipal councils, but municipal councils must at once elect their presiding officers.

OFFICE OF THE ATTORNEY-GENERAL,

July 7, 1902.

SIR: The Assistant Secretary has made a verbal request for an interpretation of the proviso of section 65 of the act entitled, "An Act concerning Municipalities," approved March 1, 1902. Stated briefly, the question propounded by him is whether the *alcaldes* of the several municipalities shall, until the second Monday of January next, continue to sit with the municipal councils as their presiding officers, with the right to vote on measures under consideration in accordance with the provisions of the prior law; or whether the several municipal councils shall now elect their presiding officers from among their own members, as contemplated in the new law, leaving to the *alcaldes* the performance of executive duties only.

The new law bears some evidence of legislative haste in its enactment, and in connection with some of its phases other than the one inquired of by the Assistant Secretary, I have found it difficult of clear interpretation. With respect however to the question now before us, I think that but one conclusion is adequate when the whole act is considered and closely studied.

The act requires a presiding officer to be chosen by the municipal council from among its own members. It is true that no special provision is made for the selection of such an officer until the second Monday of January immediately following the general elections. Nevertheless section 65 in express terms provides that until the new councils are elected and have qualified the present councils "shall exercise *all* the powers conferred upon them by this act." Among the powers conferred

is the power to elect one of its own members as its presiding officer. The same proviso requires that the alcaldes "shall exercise *all* the powers conferred upon them by this act." Among these powers vested in the alcaldes is the right to veto ordinances and municipal regulations.

From these various provisions it is evident that one of the special changes in policy intended by the new act was the separation of municipal powers and functions into two branches, one the legislative branch and the other the executive branch. In my judgment, it was the intention of the legislature under the proviso in question to utilize the present officials in order to carry out this general purpose at this time. I can see no other meaning in the provision which gives to the present councils and the present mayors all the powers conferred upon them by the act.

There are other indications of this intention in the act. From section 18 it is manifest that it was the intention of the legislature that there should be a president of the council from the date the act goes into effect, and that his presence at each meeting should be noted on the journal. In section 28 provision is made for the presentation of ordinances to the mayor and for their *return* by him to the council with his approval or disapproval; all of which, in conformity with the general principles underlying the act, seems to indicate a complete separation of the mayor after July 1, when the act went into effect, from participation in legislative functions. The same suggestion is obtained from section 30. But when we come to section 33 all doubt seems to disappear. Here is a clear, affirmative declaration that the alcaldes shall take no part in the meetings of the councils and that they shall appear before the council only when specially requested to do so. It seems to me impossible to escape the force of this provision, when taken in connection with the proviso of section 65, which states that the councils and alcaldes "shall exercise all the powers conferred upon them by this act."

Taking all of the provisions of the act together, it cannot be doubted that it was the intention of the legislature in enacting the proviso of section 65, to avoid the necessity of a special election before the elections in November next, by utilizing the present officials to carry the act out at this time in all its parts

so far as is possible. I am therefore of the opinion that it is the duty of the several municipalities of the island now to elect presiding officers, and that after July 1 the several alcaldes must refrain from participating in legislation and must become executive officers only, in the technical sense of that phrase.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

THE PARDONING POWER—CONDITIONAL PARDONS.

Under the pardoning power the Governor may grant pardons conditioned upon the acceptance by the prisoner of some punishment other than the one adjudged by the court.

A sentence of imprisonment may be commuted by the Governor to the payment of a fine, but in such case the order should be that the pardon will become effective only upon such payment being made.

OFFICE OF THE ATTORNEY-GENERAL,

July 9, 1902.

SIR: Mr. Wirt, when Attorney-General of the United States, in a communication to the President, dated on March 30, 1820, said:

The power of pardon as given by the constitution is the power of absolute and entire pardon. On the principle however that the greater power includes the less, I am of the opinion that the power of pardoning absolutely includes the power of pardoning conditionally.

In the same communication he gives instances in which the President of the United States has pardoned convicts on the condition that they would join the navy of the United States.

The language conferring the pardoning power upon the Governor of Porto Rico is substantially the same as the language used in the Constitution of the United States, and I think that it should bear the same construction, although I find decisions in Virginia and Texas holding that a condition annexed to a pardon is void. The weight of authority however seems to be to the contrary.

In *Ex parte Wells*, 18 How. 307, it was suggested that a condition annexed to a pardon amounted to legislation by the President of a new punishment to be suffered by the convict; but

the court took a different view, and, interpreting that clause in the constitution by reference to the pardoning power as understood in the old English law, held that it was competent for the President to grant a conditional pardon. See also *Ross v. McIntyre*, 140 U. S. 453.

The President of the United States has frequently commuted the penalty of death to imprisonment for life. Such action is nothing more or less than the granting of a pardon from the sentence imposed upon condition of the acceptance by the prisoner of imprisonment for life in lieu of the penalty of death. So in the case to which you referred this morning, the granting of a pardon from the sentence of imprisonment upon the condition that the prisoner shall pay a reasonable fine differs in no legal respect from the commutation of a death penalty to imprisonment for life.

I have not had time to consider the question elaborately; but your power in issuing pardons to impose conditions is not to be doubted. I think however that in the case of a commutation of a sentence of imprisonment to the payment of a fine, it would be well so to formulate your order that the pardon will become effective only upon the payment of the fine. In case therefore of your concurrence in my recommendation in the case in question your order should be so drawn.

I have the honor, sir, to be your obedient servant,
JAMES S. HARLAN.

The GOVERNOR.

MUNICIPAL LAW—APPOINTMENT OF INSPECTORS.

While there is in the municipal law no special provision authorizing the appointment of municipal inspectors, nevertheless it is a common rule of interpretation that the delegation of a general power includes the grant of the particular powers without which the general power will fail or cannot be executed.

In requiring a municipality to perform certain public duties the legislature impliedly grants to it the power to employ the means and agents suitable and necessary for carrying out these duties.

OFFICE OF THE ATTORNEY-GENERAL,
July 10, 1902.

SIR: The question propounded by the alcalde of San Juan in

his communication of June 30, is whether the power exists under the new municipal law for the appointment of "municipal inspectors," whose duty shall be to aid the alcalde and his several comisarios in seeing to the execution of municipal laws and ordinances, and to the performance of municipal duties. The alcalde states that from time immemorial the municipality has employed inspectors of this character, and that in pursuance of this custom and under the authority, as is contended, of the new act concerning municipalities, provision has been made in the budget of this fiscal year for the employment of five such officials.

In section 23 of the new municipal law are set forth the general corporate powers of municipalities. It is manifest that these municipal powers cannot be properly executed and carried out without proper inspection. And the municipal council of San Juan is apparently of the opinion that the alcalde and his comisarios are not able personally to inspect all such matters and that aid is necessary. Under these circumstances I am of the opinion that authority exists under the act in question for the employment of officials having the general duties defined in the communication of the alcalde. Although I do not find in the law any special provision authorizing the appointment of municipal inspectors, nevertheless it is a common rule of interpretation that the grant of a general power includes the particular powers without which the general power will fail or cannot be executed. In requiring of a municipality the performance of certain public duties, the legislature impliedly grants to it the power to adopt and employ the means and agents suitable and necessary for performing those duties. I need not add that by employing such officials to aid in the performance of general municipal duties no new powers are given to the municipality or to such officials. I see no objection to calling them municipal inspectors, but they can only perform such duties as are assigned to them by the alcalde or his comisarios, or by the other municipal officials whose offices are established by the statute, to aid them in carrying out the powers already granted to the municipality.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

MUNICIPAL LAW—APPOINTMENT OF INSPECTORS.

It is a well settled principle of construction that statutes apparently in conflict must be reconciled and validity be given to each, so far as that may be done on any fair hypothesis as to their meaning.

Applying that rule of interpretation, section 35 of the insular police law is not irreconcilable with sections 46, 47 and 48 of the municipal law. Under the latter municipal inspectors may be appointed, while the former was intended to correct a prior abuse and to limit the number of such inspectors.

OFFICE OF THE ATTORNEY-GENERAL,

July 18, 1902.

SIR: I have the honor to acknowledge the receipt of a communication of July 15, from the Assistant Secretary in which, among other matters, he asks whether, in view of the provisions of sections 46, 47 and 48 of the municipal law, section 35 of the insular police law is to be considered inoperative in whole or in part.

It is a well recognized principle of construction that statutes which apparently conflict with each other should be reconciled and validity be given to each, so far as that may be done on any fair hypothesis as to their meaning and interpretation. Applying this rule, I find it possible to so construe section 35 of the insular police law with sections 46, 47 and 48 of the municipal law as to give effect to both without impairing the provisions of either.

From the enumeration of his duties in section 47 of the municipal law, it is evident that the health officer was intended not only to be the head of the municipal sanitary service, but also to furnish gratuitous medical attendance to the poor. Provision is made for the appointment of one or more assistant health officers; but as they, as well as the health officer, must be licensed physicians, their number must of necessity be limited. In a city of the size of San Juan, Ponce or Mayaguez, the giving of professional aid to the indigent sick of the community and their general duties in the health department may well be assumed to occupy their time more or less fully. In addition, the health officer is also required to enforce regulations relating to public sanitation. This alone indicates the necessity, from which is to be inferred the legislative intention, that he should be

supplied with proper assistants for discharging that duty. In addition, he is required to enforce the cleansing of the streets, yards and alleys, the cleaning of earth closets, privies, ash pits, cess pools, and to suppress nuisances. While the public health officer and his professional assistants must give their attention and supervision to these matters, I do not find anything in the act forbidding a municipality to employ inspectors of a non-professional character to aid them in seeing that their orders are carried out. The health officer is also required to keep a registry of vital statistics. This may require a clerk, and, in my judgment, one may be appointed, although not expressly provided for in the law. They also have charge of the inspection of hospitals, cemeteries, etc., and perform such further duties as may be imposed upon them by law or by the Superior Board of Health or by municipal ordinances.

The extensive character of these functions indicates the necessity of supplying the health officers with such assistants in the way of inspectors or other aides as he may require to carry out the duties imposed upon him. Disregarding section 35 of the insular police law, and following the line of thought contained in my communication to you of July 10, relating to a similar matter, the power to appoint assistants to be designated as sanitary inspectors or by any other proper title, is to be found by implication in the municipal law itself. These numerous duties being required of the health officer it is to be inferred that section 47 carries with it the power of the municipal council to provide for the necessary aid in the way of clerks, inspectors, etc. In fact section 35 of the insular police law is not to be regarded so much as a legislative authority for the employment by municipalities of sanitary inspectors, as a legislative limitation of the number of inspectors to be so employed. It was intended to correct an abuse existing under the prior municipal law. It may therefore be disregarded as authority for the appointment of such inspectors, but it cannot be disregarded as a limitation upon that authority; on the contrary, in my judgment it is in full force as a limitation.

It is not necessary to add, in view of what has been said here, that any sanitary inspector provided for by the municipal council will be under the immediate and direct authority of the health officer. And as the power to provide for such officers

is to be found in the municipal law, it is clear in view of the definite terms of section 32 of that law that they can be appointed by the alcalde only and not by the municipal council.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

NOTARY—MORAL CHARACTER.

In connection with an application for appointment as a notary the attention of the Chief Justice is called to some facts in relation to the applicant, and the hope is expressed that his appointment will be refused.

OFFICE OF THE ATTORNEY-GENERAL,

July 19, 1902.

SIR: I have the honor to hand you herewith the application of Antonio Suliveres Rivera of Arecibo for appointment as a notary, together with his bond. The latter has been presented for my approval in accordance with law.

The petitioner is the man that was the subject of a communication by me to you on the 23d of November last, with which I transmitted for your consideration certain letters in his own handwriting, in which he advised a client, in case he could not get sufficient witnesses to testify in his behalf in a suit then pending, to purchase them. On the 23d of December, on behalf of your court, you made a response, indicating that nothing could be done under the law as it existed. You, however, characterized his proposals to his client as acts of immorality.

As the new law under which lawyers may be permitted to practice as notaries requires them to be of good moral character, I call the matter to your attention in the hope that you will see fit to refuse the application. I certainly shall not approve the bond until you have in writing approved the petition.

I also observe with some astonishment that the man now refers to himself as a lawyer. Will you be kind enough to advise me whether he has been admitted to the bar? At the time the matter first came to my attention, he did not claim to enjoy that title.

Very respectfully,

JAMES S. HARLAN.

The CHIEF JUSTICE.

PASSPORTS NOT TO BE ISSUED BY INSULAR AUTHORITIES.

The issuing of passports is a function that pertains to sovereignty, and is customarily performed by officials authorized by the sovereign.

In view of federal legislation in relation to passports it is not competent for the Secretary of Porto Rico to issue passports or certificates of identity to citizens of Porto Rico about to travel abroad. Certificates so issued are obnoxious to the spirit of section 4075 of the Revised Statutes of the United States, and to the public policy of the United States as expressed in federal statutes.

OFFICE OF THE ATTORNEY-GENERAL,

July 21, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of the 18th, in which, referring to occasional applications made to you for some form of certificate to be used in lieu of a passport by Porto Ricans travelling in foreign lands, you indicate that it has been your custom heretofore to require a citizen of Porto Rico about to proceed abroad to present a certificate of residence and citizenship from his alcalde, and then to certify upon it under the great seal to the official character of the alcalde and to the genuineness of his signature; and you express the view that under the language of section 7 of the organic act it may be competent for you to issue certificates directly to such applicants, certifying that the holder is a citizen of Porto Rico, and that such certificates, if issued, would have the legal effect of guaranteeing to the holder the protection of the United States. Upon this state of facts you ask whether it would be better to continue to authenticate the signature and official position of the alcalde or to issue a certificate of citizenship directly to the traveller when properly accredited to you.

I find in the reports of the Supreme Court of the United States but one adjudication on the question of passports, and the question there involved is not pertinent to your inquiry. But your attention is called to sections 4075, 4076, 4077, and more particularly to 4078, of the Revised Statutes of the United States. The latter forbids any state official to issue to a citizen of the United States a certificate "in the nature of a passport," and attaches a penalty for a breach of its provisions. Of course you are not an official of a state, and it has not been

decided that citizens of Porto Rico are citizens of the United States. As a penal statute, the last-named section would therefore have no application. But I take it to be a sufficient indication of the policy of the United States to require us not to offend the spirit of the law as thus expressed in federal legislation.

In 1835, Mr. Forsyth, then Secretary of State, in a communication addressed to the Secretary of the Commonwealth of Massachusetts, in reference to the custom in Massachusetts of issuing certificates of citizenship to citizens of that commonwealth going abroad, stated that the practice was of no concern to his department. But Mr. Fish, when occupying the same office in 1875, expressed the view that passports issued by governors of states were not only invalid, but were an invasion of the exclusive prerogative of the government of the United States in that behalf. In 1877 Mr. Evarts considered that the issuing by a notary of a certificate of identity to a person about to travel abroad was an infraction of the statute to which I have called your attention.

Generally speaking, the issuing of passports is a function that pertains to sovereignty, and is customarily performed by officials authorized by the sovereign. The sovereignty of this island is lodged in the government of the United States, and I am of the opinion that a certificate of identity given by you to a citizen of Porto Rico about to travel abroad and to be used in place of a passport would be obnoxious to the spirit of the statute to which I have alluded. I therefore recommend that the method heretofore followed by you in certifying to the official character and the genuineness of the signature of the alcalde is as far as you ought to go in this connection until Congress has legislated on the question,¹ or at least until the authorities in Washington have been consulted. It might indeed be well to call the matter to the attention of the Secretary of State with a view to obtaining from him some definite ruling upon the question.

Very respectfully,

JAMES S. HARLAN.

The SECRETARY.

¹ On June 14, 1902, the President approved an act of Congress amending section 4075 of the Revised Statutes so as to authorize the "chief or other

THE TREASURER'S RIGHT TO EXAMINE BANKS.

Although the right of an individual to do a banking business was formerly considered a common law right not subject to prohibition or legislative control, nevertheless corporations stand on a different basis, and the tendency of recent legislation has been to subject all quasi-public corporations to inspection and regulation in the general public interest.

Under the internal police power common to every state, banks are subject to general regulation and inspection; and under the authority of section 64 of the revenue law of 1901, the treasurer is authorized in making an examination of a bank to demand the production of books, papers and securities in order that it may be complete.

The treasurer's right is limited to corporations doing a banking business. And section 64 is ineffective as to any lawful bank charters in which an exemption from such inspection is granted.

OFFICE OF THE ATTORNEY-GENERAL,

July 22, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of May 24, in which you request an examination of section 64 of the Revenue Law of 1901, and an expression of my opinion as to whether there is any limitation on your power, in making an examination of a bank, to demand the books, papers or securities in order that the examination may be complete; and whether, in case of the refusal to produce any such books, papers or securities, the law makes adequate provision for enabling you to compel them to do so.

The right of an individual to conduct a banking business is a very ancient one, and was formerly considered a common law right not subject to prohibition or control by the legislature. Corporations however are artificial persons, and banking corporations or companies seem to stand on a somewhat different footing. The tendency of legislatures in recent years has been, however, to bring all quasi-public corporations within their control to the extent of inspecting and regulating them in the general public interest, and the courts have not been slow to uphold such legislation.

executive officer of the insular possessions of the United States" to issue passports to those "owing allegiance, whether citizens or not, to the United States." (Chap. 1088, p. 386, Stat. at Large, 1901-1902.) But the fact had not come to the knowledge of the insular government.

This tendency is well illustrated in *Eagle Insurance Company v. Ohio*, 153 U. S. 446. In that state, after the company was organized, acts were passed providing for the inspection of such companies. It was held that corporations, whatever might be their nature, even though organized before the act went into effect, were subject to such reasonable regulations as to the conduct of their affairs as the legislature might from time to time prescribe, provided that the regulation did not interfere substantially with the enjoyment of the privileges granted by the state in their charters. The court says:

It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals and the prosperity of the people, might not, when unrestrained by constitutional limitations on its authority, provide by reasonable regulations against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, expressed or implied, have been exercised at all.

In view of the intimate relation between bankers and the financial prosperity of the people, these general considerations seem to me to apply with special force. I am of the opinion that banks are subject, under the internal police power which every state must necessarily have, to general regulation and inspection. The weight of authority seems to be that for the general public safety, a state may in the exercise of such police power, regulate and restrict the business of banking. The provision of the section of the revenue law to which you refer contains all proper limitations with respect to such inspection. I am of the opinion that you may proceed under its authority to carry out its legislative intent, and that in case of a refusal to permit an examination of their books, there are adequate means for compelling compliance.

I limit these observations, however, to banking corporations. I have not at hand copies of the charters of the older institutions. If section 64 substantially impairs any exemption from such an inspection that may be contained in such charters, it would, in such case, be, of course, ineffective.

Very respectfully yours,

JAMES S. HARLAN.

The TREASURER.

NATURALIZATION OF ALIENS.

Porto Rico is neither a state nor an organized territory, and the only court in the island competent to take a declaration of intention by an alien is the United States District Court for the District of Porto Rico.

PONCE, *October 23, 1902*, MUNICIPAL JUDGE: Encloses a communication from Luis Favillot, who desires to become an American citizen, his nationality being Danish.

As there is no precedent in that court by which this case might be resolved, and the only law which would serve to throw light on the subject is the law on civil register, which mentions the insular government, submits the matter for resolution.

[1st endorsement:] Secretary's Office, October 24, 1902. Respectfully referred to the Honorable, the Attorney-General of Porto Rico. By direction of the Governor. WILLIAM H. GALE.

[2d endorsement:] Office of the Attorney-General, *October 28, 1902*. Respectfully returned to the Governor of Porto Rico. The law in respect to naturalization is to be found in sections 2165 to 2174, inclusive, of the Revised Statutes. The former section provides that an alien may be admitted to citizenship of the United States by declaring on oath, at least two years prior to such admission, his intention to become a citizen and to renounce foreign allegiance. This declaration must be made before a circuit or district court of the United States or a district or supreme court of the territories or a court of record of any of the states having a common law jurisdiction and a seal and clerk. Porto Rico is neither a state nor an organized territory, and I am of the opinion therefore that the only court in this island competent to take a declaration of intention by an alien is the United States District Court for the district of Porto Rico.¹

¹ There has been no judicial declaration that Porto Ricans are citizens of the United States. And if Porto Rican judges were permitted to receive declarations of intention or to take other proceedings under the federal law of naturalization, aliens would be made citizens of the United States by authorities who do not themselves enjoy that status.

It might be well to advise Mr. Favillot to present himself to that court when in session at Ponce, at which place he seems to live. JAMES. S. HARLAN.

ATTACHMENT OF SALARY OF PUBLIC EMPLOYEES.

Article 1449 of the code of civil procedure, as amended by royal decree of June 28, 1895, which authorized the courts to attach in the hands of public disbursing officers, one-fifth part of the salary and allowances of public employees in satisfaction of judgments entered against them, has been repealed by section 121 of the political code, which provides that disbursing officers will not be credited by the auditor with disbursements until the vouchers therefor have been paid and receipted in due form by the public creditor who rendered the services or furnished the supplies for which payment is made.

Notwithstanding the repeal of article 1449 of the code of civil procedure, the heads of the departments ought to require employees to satisfy judgments against them on some fair basis of monthly payments. Otherwise the public service may be discredited and become a refuge for persons that do not meet their obligations.

OFFICE OF THE ATTORNEY-GENERAL,

October 28, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of the 24th, transmitting a copy of an order by the municipal judge of the Cathedral District, requesting you to deduct monthly twenty per cent of the salary of a teacher employed in your department, until the payment of a certain judgment against him for \$164.60 shall have been satisfied. You also mention the fact that deductions have been made on similar orders in certain other cases where judgments have been entered against employees in your department.

Under article 1449 of the code of civil procedure, as modified by the royal decree of June 28, 1895, the courts were authorized to attach in the hands of public disbursing officers the one-fifth part of the salary and allowances of public employees in satisfaction of judgments entered against them. Your attention however is called to section 121 of the political code, which provides as follows:

Credit thereon (i. e. on vouchers) shall not be allowed by the Auditor in the statement of accounts of any disbursing officer or agent, until such

vouchers are paid and receipted in due form by the public creditor who rendered the services or furnished the supplies for which payment is made.

It is clear under this section that payments may no longer be made into court of any portion of the salary of a public employee, unless such employee has first receipted the voucher in due form and has authorized that disposition of the money due to him. To this extent section 121 of the political code has repealed article 1449 of the code of civil procedure. There has been some doubt however in my mind whether, upon a full consideration of the matter, the courts would hold that the entire article 1449 has been repealed. However that may be, I am inclined to think that the heads of the departments in any event and as a condition of continuance in the service, ought to require employees to satisfy judgments against them on some fair basis by monthly payments out of their salaries. Otherwise the public service may be discredited and become a refuge for persons that do not meet their obligations.

The copy of the order in question is herewith returned as requested.

Very respectfully,

JAMES S. HARLAN.

The COMMISSIONER OF EDUCATION.

LETTERS PATENT—FEDERAL JURISDICTION.

The issuing of letters patent is a jurisdiction generally belonging to the sovereign; and therefore upon the change of sovereignty in this island the right of the insular authorities to issue letters patent under the Spanish law terminated.

There is no reason for doubting that under section 14 of the organic act the federal legislation in respect to letters patent and the protection of property rights thereunder, was extended to Porto Rico. But Spanish letters patent valid in Porto Rico on the date of the treaty of Paris, when in conflict with letters patent issued by the United States either before or after that date, must, under article 13 of the Treaty, be held to be of prior right and paramount force in Porto Rico during the period of their effectiveness under the Spanish law.

The trade-mark legislation of Congress not being locally inapplicable would seem to be of full force in Porto Rico, at least with respect to such certificates of registration as would be valid elsewhere under that enactment.

OFFICE OF THE ATTORNEY-GENERAL,

October 29, 1902.

SIR: The enclosed inquiry of September 30, by Messrs. Bradford & Hood, patent attorneys of Indianapolis, Indiana, is, in substance, whether letters patent and certificates of trade-mark registration issued by the United States prior to the acquisition of Porto Rico, will be recognized as in force and effect in this island at the present time; and if not, whether there has been any provision of law by which such certificates of trade-mark registration and such letters patent may have force and effect in Porto Rico.

As the question of property rights in inventions is one committed by the constitution to the central government, the inquiry might more aptly have been made to the authorities at Washington. Undoubtedly their conclusion as to whether federal legislation on that subject extends to Porto Rico would be accepted as final by this government. Moreover as the federal courts only have jurisdiction to protect property rights in inventions when evidenced by letters patent issued by the general government, no announcement by the insular government on that question could be conclusive. But as applications under the old Spanish law for letters patent for inventions have been filed here since the institution of the American civil government, the question is one that has been considered in this office. The following general conclusions were reached and are now restated for the information of the writers of the communication in question:

The Spanish law in force in Porto Rico contained provisions for the issuing of letters patent in the island and was in force here at the time of the American occupation. But as the insular patent system was a part of the Spanish national system for protecting property rights in inventions, it has been thought that upon the institution here of an American government the right of the insular authorities to issue letters patent was terminated and, together with the body of Spanish legislation on that subject, ceased to be in force in the island. This thought is strengthened by the suggestion that the right to issue letters patent is one that generally belongs to the sovereign, and as the sovereignty of this island is lodged in the government at Washington, the military authorities then in possession of the island

were not competent to act upon such matters. Subsequently the organic act of Porto Rico, otherwise described as "An act temporarily to provide revenues and a civil government for Porto Rico and for other purposes," was passed by the Congress of the United States and approved by the President on April 12, 1900. Section 14 provides as follows:

That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States.

There seems to be no sound reason for doubting that the effect of this provision was to extend to Porto Rico the entire body of federal legislation in respect to letters patent and the protection of property rights thereunder. It may safely be concluded therefore that property rights in inventions acquired under federal legislation in that behalf, whether before or after the treaty of peace, must be respected in Porto Rico as other property rights are respected. Nor is it to be doubted that the federal courts in Porto Rico and elsewhere would take this view of the question.

The full force of this statement must be modified however by a reference to article 13 of the treaty of Paris. That portion of it that is pertinent to this inquiry reads as follows:

The rights of property secured by copyright and patents acquired by Spaniards in the island of Cuba and in Porto Rico, the Philippines and other ceded territories at the time of the exchange and ratifications of this treaty shall continue to be respected.

Under this clause of the treaty, I am of the opinion that Spanish letters patent that were valid in Porto Rico at the time of the ratification of the treaty of Paris, when in conflict with letters patent issued by the United States either before or after that date, must be held to be of prior right and paramount force in Porto Rico, at least during the period of their effectiveness under the Spanish law.

The act of the Congress of the United States entitled "An act to authorize the registration of trade-marks and to protect the same," approved March 3, 1881, would seem to be not locally inapplicable, and therefore of full force and effect in Porto Rico, at least with respect to such certificates of registration as would be valid elsewhere under that enactment. Whether a

citizen of Porto Rico may be said to be "domiciled in the United States" within the meaning of that phrase as used in the first section of the act and hence entitled to the benefit of that act, is a question for the courts to resolve.

Property rights in trade-marks are not specifically mentioned in the treaty of Paris. Article 8 refers to the property rights of private individuals and declares that they are not to be impaired by the treaty. Possibly this language may be broad enough to give priority to Spanish trade-marks where they conflict with American trade-marks, but I shall attempt no final expression of opinion on that question. For the information however of the writers their attention is called to an act in relation to trade-marks passed by the last legislative assembly of Porto Rico. This law contains general provisions for the registration of trade-marks and the protection of property rights therein so far as those rights may be controlled by local legislation.

I have the honor, Sir, to remain

Your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

MUNICIPAL SLAUGHTER HOUSE—TAX ON MEAT.

The municipal budget of Cayey contains no provision for any tax on meat except in connection with the municipal slaughter house. As the municipality is bound by its budget during the fiscal year for which it was established, no tax may lawfully be levied on beef slaughtered in a private slaughter house.

CAYEY, *October 24, 1901*. MAJOR SWIFT, U. S. A.: States that bids for supplying fresh meat will be opened to-morrow. Is informed by bidders that the alcalde demands a tax of one cent a pound on all meats sold to the government. Inquires whether this is legal. Telegram submitted personally by Captain Blunt to Attorney-General for his opinion.

CAYEY, *November 4, 1901*. MAJOR SWIFT, U. S. A. Telegram: States that beef contractors intend to kill in private place three-quarters of a mile from town.

[1st endorsement:] Office of the Attorney-General, *November 6, 1901.* Respectfully returned to Captain Blunt, Adjutant U. S. A., with the statement that the municipality of Cayey in the matter of levying local taxes is controlled by the schedule of municipal taxes submitted to and approved by the Executive Council of Porto Rico. In this schedule is a tax of one cent a pound on all neat cattle slaughtered at the municipal slaughter house. This tax is levied as compensation for the use of municipal property.

Without entering upon a discussion of the general question as to whether municipalities may levy a tax upon meat, it is sufficient in this matter to say that the municipal schedule contains no provision for any meat tax except in connection with the municipal slaughter house; and by this schedule the municipality is bound. It follows therefore that the proposed tax of one cent a pound on beef slaughtered in a private slaughter house is not valid. JAMES S. HARLAN.

CRIMINAL PROCEDURE—AUTHORITY OF FISCAL TO DISMISS—
PRIVATE PROSECUTORS.

Under the new penal code, when a formal accusation has once been filed in court it cannot be dismissed by the fiscal except upon the consent of the court. The court controls its own functions and is not subject to control by the fiscal in a criminal case, as under the Spanish law.

Under the new penal code of procedure no private prosecution is permissible. That code deals with crime as offenses against the state and does not consider the private wrong. The state only has the right to punish for crime. The fiscal, when convinced that a crime has been committed, may by courtesy permit another attorney to present the case to the court for him and as representing the state.

A substitute may be appointed by the fiscal only with the approval of the Attorney-General.

OFFICE OF THE ATTORNEY-GENERAL,

November 14, 1902.

SIR: I have the honor to acknowledge the receipt of your letter of the 11th, containing a copy of your dissenting opinion in *People of Porto Rico v. Felix Zengotita*. The situation in which the court finds itself will be largely relieved from embarrassment by bearing in mind that the penal system now

in force is an altogether new one, and that all previous laws, decrees or orders in conflict with its letter or with its spirit have been repealed. Under the new system when a formal accusation has once been lodged in the court, it cannot be disposed of without the judicial action of the court. In other words, the prosecuting attorney may express his opinion that the guilt of a man has not been sufficiently proved, but he cannot, without the acquiescence of the court, give effect to this view. A case may not be dismissed by him except upon the consent of the court. In the case in hand, therefore, if the court was convinced upon the evidence adduced before it of the guilt of the accused, the motion of the fiscal for acquittal should have been denied and a judgment entered against the prisoner. The court, in other words, controls its own functions, and is not subject to control by the fiscal when a formal complaint has once been filed in the court.

The system of private prosecutions in criminal cases has undoubtedly been repealed, and no private prosecutor has now the right to appear before the court except through the courtesy of the fiscal. The new system deals with crime as offenses against the state and does not take into consideration the private wrong. The state only has the right to punish for crime; but where the fiscal is convinced that a crime has been committed he may by courtesy permit another attorney to present the case to the court for him and as representing the state.

But the fiscal under the new law can only appoint a substitute with the consent and approval of the Attorney-General.

Very respectfully,

JAMES S. HARLAN.

Hon. J. A. ERWIN, Associate Judge of the District Court of
Mayaguez.

PARDONS BY THE COURTS.

Under the organic act the power of pardon rests in the Governor of Porto Rico, and all powers of clemency theretofore delegated either to the courts or to the persons injured by the accused were merged, under section 17 of the Foraker act, in the Governor of the island.

OFFICE OF THE ATTORNEY-GENERAL,

November 19, 1902.

SIR: Having observed in the public press a few days ago that one Juan Rivera Otero, in confinement in the presidio on a charge of rape, had been released from prison upon the order of your court, I took occasion to verify the fact by inquiry of the director of prisons.

I am of the opinion that your court had no authority in law to take such action.¹ With respect to prisoners convicted for crimes committed prior to the date of the organic act of the island, I have no doubt that those provisions in the Spanish law, delegating to courts the power of pardoning such offenders when the crime was condoned in open court by the person injured, are still in force. But as to persons convicted for crimes committed after the approval of that act on April 12, 1900, it seems quite clear that the power of pardon rests only in the Governor of Porto Rico. I think it a proposition not open to doubt that all powers of clemency theretofore lodged either in the persons injured or in the courts of the island were merged under section 17 of the Foraker act in the Governor of Porto Rico. There can be no question that it was the intention of the Congress of the United States thus to make the pardoning power here conform to that power as it is generally understood in the United States.

While it is not my purpose to take steps for the re-imprisonment of this young man, I request that in the future your court will not issue orders of this nature. This general question, as you may remember, was the subject last year of some corre-

¹ Under the Spanish law rape and seduction were considered as private wrongs and when condoned in open court by the person injured both the court and the public prosecutor were powerless to proceed. A condonation was effective even after conviction and imprisonment.

spondence between us in connection with the case of José Erasmo Rivera.

Very respectfully,

JAMES S. HARLAN.

THE PRESIDING JUDGE OF THE DISTRICT COURT OF ARECIBO.

GRADED SCHOOL TEACHERS—SALARIES.

If the labor and responsibility differ in degree and extent in different graded schools, the services rendered in them cannot be said to be a similar service within the meaning and intent of section 15 of the school law; and it is competent for the Commissioner of Education, within the limits prescribed by law, to fix the salaries of graded school teachers in accordance with the several degrees of responsibility and labor involved.

OFFICE OF THE ATTORNEY-GENERAL,

November 27, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of the 26th enclosing a letter from Eduardo Capó, a graded school teacher in the municipality of Gurabo, who contends that under section 15 of the school law he is entitled to receive a salary of fifty dollars a month instead of the salary of forty dollars a month now being paid to graded school teachers in Gurabo.

Section 15 of the school law provides that the salaries of all teachers shall be fixed by the Commissioner of Education; and with reference to graded school teachers the appropriation act for the present fiscal year provides that salaries shall be paid "at not less than forty dollars and not more than sixty dollars per school month." Within those limitations therefore there is delegated to the Commissioner of Education the discretion of determining the amount of monthly salaries to be paid to such teachers. The teacher in question however bases his contention upon a proviso in section 15 under the terms of which "teachers performing similar service shall receive the same salary." All the facts in the case are not definitely before me, but I assume that at some graded schools other than those in Gurabo, your department is now paying teachers at the rate of fifty dollars a month. On the other hand, your correspondent and other graded school teachers at Gurabo are receiving forty

dollars a month. And this discrimination your correspondent holds to be unlawful. This contention requires the interpretation of the phrase "similar service" as used in the section of the law above alluded to.

If the responsibilities and duties of a graded school teacher in Gurabo are as great as those of a graded school teacher elsewhere who is receiving a salary of fifty dollars a month, I am inclined to the opinion that the contention of the teacher in question is a correct one. Similar service, under the terms of that law, should be similarly compensated. I understand however that some graded schools are of more importance and involve larger responsibilities and duties on the part of the teachers than graded schools elsewhere in the island. And if such differences in responsibility and duty exist I do not think that the service can be said to be a "similar service." In other words, if there are different degrees of responsibility and different degrees in the labor and duties performed, it is quite proper that this difference should find expression in the amount of the salary paid. And in my judgment the Commissioner of Education has the power under the law to adjust the salaries of graded school teachers in accordance with his opinion of the degrees of responsibility and labor required in the different schools.

Very respectfully,

JAMES S. HARLAN.

The ACTING COMMISSIONER OF EDUCATION.

PUBLIC UTILITIES—RIGHT TO REGULATE RATES.

The right is inherent in every government to control and regulate public-service corporations like railroads, street car, telegraph, steamship, telephone and other similar companies. That part of the joint resolution of Congress of May 1, 1900, that requires the Executive Council, in granting ordinances for public franchises, to provide for the effective regulation of the charges thereof, is mandatory. And the opinion is expressed that the Executive Council will not be willing in any ordinance granting such franchises or concessions to endeavor to evade that requirement of law or to modify its full force and effect.

The same considerations of good faith which restrain the legislatures of the several states from oppressive action in the control of rates charged by public-service corporations, will induce conservatism in the exercise by the Executive Council of this power of regulation.

OFFICE OF THE ATTORNEY-GENERAL,
Washington, D. C., December 13, 1902.

SIRS: I have the honor to acknowledge the receipt of your communication of the 11th, in which reference is made to certain provisions that you find objectionable in the ordinance lately passed by the Executive Council of Porto Rico, granting to Mr. J. D. H. Luce the right to construct and operate a wharf in the harbor of Ponce.

The specific criticism of section 5 of that enactment¹ indicates that your construction of the joint resolution by Congress of May 1, 1900, is fundamentally different from the interpretation heretofore and now put upon it by the insular government. That part of the joint resolution that requires the Executive Council, in granting franchises to public-service corporations, to provide for the "effective regulation" of their charges, has had but one meaning to the insular government since its creation. Every ordinance without exception heretofore enacted by that body has contained a similar clause. Your objection to it is the more surprising because of the fact that the reservation of the right to regulate charges is the particular phase of all such ordinances passed by the Executive Council that has never before been questioned by any one.

Moreover, the public policy involved in our construction of the joint resolution is not a new one. The right is inherent in

¹ Section 5. For the use of said landing pier or wharf by vessels for the purpose of loading or unloading cargoes or for the purpose of laying up without loading or unloading, the grantee shall have the right to collect charges as follows:

(a) For the use of said landing pier or wharf by vessels for the purpose of laying up or mooring without loading or discharging cargoes a maximum charge of one and one-half cents for each registered or measured ton for each day or fraction thereof.

(b) For the use of said wharf by vessels in loading or discharging cargoes thereon the maximum charges set forth in the following schedule may be made, etc., etc.:

* * * * *

(c) The foregoing or any supplemental schedule of charges or any part thereof or any other general charge made by the grantee hereunder are subject to modification, amendment, or alteration at any time by the Executive Council; and all charges for goods and merchandise loaded or unloaded on or from said landing pier or wharf not set forth in any such schedule of charges may be regulated, modified, altered or amended by the Executive Council at any time.

every government to control and regulate the charges of public-service corporations. And the Congress in making that our rule of action has simply put upon the federal statute books what was already the law in Porto Rico and is now the law in Massachusetts and in every other state of the Union, as I understand it. I do not happen to recall any case in which the question of the right of a state to regulate wharf charges has been involved; but it will not be difficult to cite cases in which statutes regulating the charges of nearly every other form of public utility have been upheld. Besides railroad, street car, telegraph, steamship and telephone companies, gas, water, bridge, turnpike, elevator, stockyards and warehouse companies have had their charges regulated by statutes that have been upheld by the courts. You will doubtless recall such cases, and may know of cases involving the regulation of wharf charges. At any rate, there is an obvious difficulty in distinguishing a public wharf from a public bridge, turnpike, warehouse or elevator. In this connection you might refer to some observations by Mr. Justice Bradley in *Transportation Co. v. Parkersburg*, 107 U. S. at p. 699.

But aside from the question of the inherent right of all governments to control and regulate the charges of public-service corporations, the insular government has heretofore deemed the resolution of Congress of May 1, 1900, to be mandatory, an express direction to the Executive Council by the national government to retain control of the matter of charges and to reserve the right at any time to modify or change them. In my judgment the Executive Council will not be willing in this case to make an exception or to use any language in an ordinance that may subject it to the charge of endeavoring to evade that requirement of law or to modify its full force and effect. Of necessity, however, the same considerations of good faith and fair dealing that restrain the legislatures of the several states from oppressive action in such matters would control the exercise by the Executive Council of this power given to it by Congress. The same policy of encouraging and fostering public enterprises that has made the exercise of such power by the states a matter of infrequent occurrence, resulting only after long deliberation and upon strong grounds, will induce conservatism in its use by the Executive Council.

In my judgment section 5 of the ordinance involves no danger to your enterprise, and I feel quite sure that the Executive Council will find itself unable to accept your view of the joint resolution of Congress. I shall be glad however, should you so desire, to lay your views before the Committee on Franchises, Concessions and Privileges for its consideration.

Very respectfully,

JAMES S. HARLAN.

Messrs. GASTON, SNOW & SALTONSTALL,
Counselors at Law,
Boston.

VACANCIES IN MUNICIPAL COUNCILS—HOW FILLED.

Section 14 of the act of March 1, 1902, "concerning municipalities" provides a definite method for the filling of vacancies in the municipal councils, and as the act repeals all laws in conflict therewith the old Spanish law cannot be looked to in construing the clause in section 10 of said act which provides that "the vacancies thus occasioned shall be filled by the supplemental councilmen in the order in which they appear." *Therefore held*, that this clause is meaningless and should be disregarded in applying the law.

OFFICE OF THE ATTORNEY-GENERAL,
December 22, 1902.

Sir: I have the honor to acknowledge the receipt of your communication of this date, in which you request an opinion as to the construction which should be given to the clause "If for any reason whatsoever any one or more of the newly elected councilmen shall fail to attend said inaugural meeting, the vacancies thus occasioned shall be filled by the supplemental councilmen in the order in which they appear."

While it does not so appear in your communication, I infer that you quote from section 10 of the "Act concerning municipalities," approved March 1, 1902, and effective July 1, 1902, and shall answer your question as though you had cited that section of the law.

The act of March 1, 1902, above mentioned, provides for a municipal government for each of the municipalities of the island, and creates a number of municipal offices, among them

that of councilmen. It provides how they shall qualify and defines their duties, and also enumerates the powers of the municipalities in their corporate capacities. The act expressly repeals all laws in conflict with it, thus abolishing all municipal governments as they existed under the Spanish laws, in so far as they may be in conflict or be inconsistent with the new laws. Therefore we cannot recur to the Spanish municipal laws to aid us in construing the section of the law mentioned by you.

With the exception of the sentences quoted by you, I can find no reference to the office of supplemental councilmen in the existing municipal laws. There is no provision of law directing how and by whom they shall be appointed, nor when their tenure of office shall begin to terminate, and hence I am of the opinion that the sentence appearing in section 10 was inserted through clerical error.

I find that section 14 of the said act of March 1, 1902, provides that if from any cause the office of councilman becomes vacant, the fact of the vacancy shall be communicated in writing to the Secretary of Porto Rico, and he shall inform the Governor, who shall, with the advice and consent of the Executive Council, fill such vacancy by appointing some suitable person as councilman, etc. The section of the law just cited precludes the idea of supplemental councilmen being recognized in any way.

I am reliably informed that the municipal law as originally drafted contained provisions for supplemental councilmen, but that those provisions were stricken out before the final passage of the bill. Undoubtedly the failure to eliminate the sentence quoted by you was an oversight. The sentence as it stands is meaningless and should be disregarded in applying the law.

Respectfully,

FRANK FEUILLE,
Acting Attorney-General.

The ACTING SECRETARY.

MUNICIPAL COUNCILMEN—TENURE OF OFFICE.

In construing the municipal laws preference will be given in case of conflict to the later enactments of the legislature.

The term of office of municipal councilmen does not begin until the date fixed for their qualification, that is, the second Monday in January following their election; and they hold office for two years from that date, and until their successors are elected and have qualified.

OFFICE OF THE ATTORNEY-GENERAL,

December 22, 1902.

SIR: I have the honor to acknowledge the receipt of your communication of this date asking for the opinion of this department "as to what construction should be placed on sections 7 and 10 of 'An Act concerning municipalities' in so far as they relate to the date from which the municipal councils shall serve, when the said sections are construed together and when they are both considered in connection with section 3 of 'An Act to provide for municipal elections in Porto Rico.'"

The question in effect is: under existing laws, when does the term of office of municipal councilmen-elect begin?

"An act to provide for municipal elections in Porto Rico," approved February 11, 1902, and effective the same day, provides for the election of municipal officers and councilmen on the first Tuesday after the first Monday in November, 1902, and every two years thereafter, and section 3 of said act provides that all municipal officers elected under the provisions of said act shall hold office for two years from and after the first day of January next ensuing after their election, and until their successors are elected and have qualified.

Section 7 of an "Act concerning municipalities," approved March 1, 1902, and effective July 1, 1902, provides that municipal councilmen shall serve for two years from the first Monday of the January immediately succeeding their election. Section 10 of the same act provides that the councilmen elected shall be present at the inaugural meeting of the municipal council on the second Monday in January immediately succeeding the election and qualify by taking the oath of office before the outgoing mayor, etc.

The provisions of law above referred to seem to be in con-

flict as to the time when the term of office of municipal councilmen shall begin, but, in my judgment, the conflict is not serious and the law may be easily reconciled.

The act of February 11, 1902, and the act of March 1, 1902, were passed at the same session of the Assembly and relate to the same subject matter, and under the well recognized rules of construction should be considered as one act and should be construed so as to make all their provisions harmonize if possible, and if this cannot be done then the later expression of the legislative will should govern as being more likely to convey the intent of the lawmakers.

Applying the foregoing rules of construction to the laws in question, it is my judgment that the tenure of office of councilmen elected at the general election just passed does not begin until the second Monday in January, 1903. Section 10 of the act of March 1, 1902, is the only provision of law which prescribes in express terms the time and manner for the qualification of councilmen, and that section clearly states that those officers shall appear before the outgoing mayor on the second Monday in January following their election and take the oath of office. This clearly expressed special provision should control the general statements in the other parts of the municipal law. No officer-elect can lawfully take possession of an office until he qualifies, and as the municipal law expressly states that the installation of councilmen shall take place on the second Monday in January there is no way by which a councilman can legally enter upon the duties of his office before that date, and hence his term of office cannot begin until he qualifies; that is to say, on the second Monday in January next following his election.

The construction I have placed on the law preserves the material feature of section 3 of the act of February 11, 1902, which fixes the tenure of office of councilmen at two years and until their successors are elected and have qualified, because while the councilmen-elect, under that construction, cannot take possession until the second Monday in January, 1903, instead of the first of January, as provided by that act, still their term of office will continue until the second Monday in January, 1905, and thus they will have served the full term allowed by law.

Section 7 of the act of March 1, 1902, must give way to the provisions of section 10 of the same act in so far as the former section is in conflict with the latter, under the familiar rule that later provisions of a law must prevail over preceding provisions of the same law when there is an irreconcilable conflict between them.

I am of the opinion that the construction given by me to the laws in question harmonizes all the provisions of the laws relating to the tenure of office of municipal councilmen, so as to make them operate together consistently with the intent of the latest enactments and in conformity to the legislative will.

Very respectfully,

FRANK FEUILLE,
Acting Attorney-General.

The ACTING SECRETARY.

**MILITARY PROPERTY AND OFFICIALS SUBJECT TO LOCAL
POLICE POWER WHEN NOT IN MILITARY RESERVATIONS.**

Within the limits of military reservations acquired by the Federal government under the Treaty of Paris, the insular laws and police regulations have no force or effect. With that exception the police power of the government of the island is co-extensive with its territorial limits and extends to all persons and property without regard to the official character of the person or the ownership of the property.

The fact that a government wagon when on an insular highway was in control of a soldier and under the orders of a military official, does not exempt it from being stopped and searched by insular officials in a proper case. The law recognizes no privileges or privileged persons, but all alike are subject to civil jurisdiction and to local police regulations.

OFFICE OF THE ATTORNEY-GENERAL,
January 19, 1903.

SIR: I have the honor to acknowledge the receipt of your note of the 14th enclosing a communication to the governor from Major Eben Swift of the Porto Rico Provisional Regiment of Infantry, U. S. Army, in which he suggests for the governor's consideration some questions of law arising out of acts of certain employees of your department to which Major Swift has made objection. This letter has been transmitted to you by the

governor for examination, and you desire my opinion thereon. Although the matter seems heretofore to have been the subject of some formal expression of your own views they have not been laid before me, and this report is therefore confined to the issues presented by Major Swift.

It appears that on the 16th of December last certain internal revenue agents of your department stopped and searched a government wagon containing private property belonging to Major Swift. The papers do not disclose where this occurred, but I assume that it was not in a military reservation but on an insular public highway. It seems proper for me also to assume that the act was not done in wantonness, but for a definite purpose and in the belief by the officials in question that they were exercising a lawful authority.

Major Swift's views of the matter are set forth in the following language :

First, that the Constitution of the United States guarantees my private property against such searches, except upon a warrant issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the things to be seized.

Second, that a United States government wagon is government territory as much as a government reservation, and it is not within the power of insular officials to search it.

When that wagon is acting under the orders of a military commander it is under the orders of the President of the United States.

Third, I would have given the insular officials every facility to enforce the revenue laws if I had been requested.

Underlying many questions that are presented to this government for consideration is the principle, in general terms, that it is within the constitutional authority of the Congress of the United States to make any provision for this island which in its discretion may seem desirable. And it is not to be doubted that it could by legislative enactment exempt military officials and military property from the police power of the insular government. So far as I am advised, however, Congress has passed no such statute. The questions must therefore be considered upon general principles, and it is in that manner that they are presented by Major Swift, who does not indicate the existence of any special statute touching the matter.

The United States acquired dominion in this island and juris-

diction and authority over its people by conquest and treaty. In subsequently creating for it a civil government it reserved certain portions of the public domain for naval and military purposes. And within the limits of those reservations no jurisdiction by the civil government thus established has ever attached or now exists. The insular police regulations and other laws do not extend to them ; even the laws in relation to public health have no force and effect within their boundaries. No process may be served there or other authority exercised by insular officials. In other words, with respect to the insular government those reservations are practically foreign soil, beyond the control of the insular authorities and beyond the force and operations of insular statutes and laws, as fully as though they belonged to and constituted a part of the territory of a foreign nation. If therefore the act in question had occurred within one of these reservations it is manifest that the insular officials engaged in it would have been exercising an authority that did not belong to them by law.

But outside of these national reservations there can be no doubt that the police power of the government of this island is co-extensive with its territorial limits, and may be exercised in accordance with law over all persons and property without regard to the official character of the person or the ownership of the property. So definite is this jurisdiction that, should the United States by purchase or condemnation now acquire for military or naval purposes any lands in this island to which the police power of the insular government now extends, such jurisdiction with respect to offenses against the civil laws as distinguished from the military laws would continue in full force in the new reservation thus created, even though occupied by the military authorities for military purposes, unless the Congress of the United States, in the exercise of its paramount authority, should otherwise provide or unless this government by proper legislation should cede to the United States all jurisdiction in the premises.

In time of war the military authority is supreme, but I take it to be a proposition not open to discussion, that in time of peace the military is subject to the civil authority, within the territory over which civil jurisdiction extends. Even in a military reservation, which is under the civil as well as the

military jurisdiction of the United States, an offense against the civil law of the United States as distinguished from a military offense is cognizable in the civil courts of the United States. This is a rule of law long recognized in the American system of government, and it is in force in this island as fully as in the states and organized territories of the United States.

In applying these principles to the facts presented by Major Swift, it is not necessary closely to scrutinize or analyze his suggestion that a government wagon proceeding along an insular highway is national territory as fully as a government reservation. Whatever may be its character, it is quite certain, in the absence of a federal statute providing to the contrary, that, being outside a military reservation, it was subject to the civil jurisdiction and authority as fully as a wagon of private ownership would be under similar circumstances. And the fact that it was in the control of a soldier and under the orders of a military official does not exempt it from insular jurisdiction or from the force and operation of insular statutes. It would doubtless not be contended by Major Swift that a military official in time of peace could recklessly and at an unlawful speed drive a government wagon over an insular road without subjecting himself to arrest and punishment by the insular authorities, whatever might be the use then being made of the wagon. In time of peace the law recognizes no privileges or privileged persons, but all alike are subject to civil jurisdiction and to local police regulations.

Doubtless Major Swift in making his comments upon the case in question had in mind the general provisions of law in relation to wagons engaged in the service of the United States post office. They are protected from local interference by federal statutes enacted under the authority of a constitutional provision that gives to the Congress of the United States the right to establish post offices and post roads. Such laws are undoubtedly within the power of the national legislature to enact. And in this island, as heretofore suggested, Congress could, if it so elected, exempt military officials from the local police power. But in the absence of such legislation I am of the opinion that the insular officials in question were acting within their lawful power. The question of the necessity or propriety of their action is not before me; nor are the facts

sufficiently stated on the within papers to enable me to reach any conclusion in that connection.

Very respectfully,

JAMES S. HARLAN.

The TREASURER.

LAW AND ORDER LEAGUE OF GUAYAMA.

It is a fundamental principle in any organized community that grievances must be redressed by the courts, and those that take the law into their own hands or attempt to do so, are themselves violators of the law.

An association organized for the purpose of "maintaining law and order irrespective of political parties" is therefore unlawful and those connected with it are subject to the provisions of the penal code.

OFFICE OF THE ATTORNEY-GENERAL,

January 22, 1903.

SIR: I have the honor to acknowledge the receipt of your communication of the 19th in which you advise me that in your vicinity an association has been organized under the name of the "Law and Order League of Guayama," having for its object, as you state its purpose, the maintenance of law and order irrespective of political parties. You express the desire of yourself and of your colleagues to conform with the law in all respects, and you ask whether it will be necessary under the laws of Porto Rico for the society to secure a charter. In such case you wish to be informed of the steps to be taken.

You are advised in reply to the inquiry that the organization, whether incorporated or maintained as a mere society, is not only without the authority of law but is contrary to its provisions. It is a fundamental principle in any organized community that grievances must be redressed by the courts, and those that take the law in their own hands or attempt to do so are themselves violators of the law. It becomes my duty therefore to advise you that any steps taken by you or your associates with any such purpose in view, is an offense against the penal code and I shall not hesitate to proceed accordingly. If grievances exist your course is to advise the proper authorities of them and a redress will be had.

Very respectfully,

JAMES S. HARLAN.

MR. BERTRAM W. GREEN,
Hacienda Teresa.

MUNICIPAL IRREGULARITIES IN SAN JUAN.

The condition of affairs in the municipality of San Juan examined and a statement made of the irregularities and frauds that have occurred in the several departments of the municipal administration. The alcalde's responsibility is pointed out and his immediate dismissal is recommended by the Attorney-General.

OFFICE OF THE ATTORNEY-GENERAL,

January 23, 1903.

SIR: On the morning of the 3d of December, a few hours before my departure for the north, I directed to you a communication touching certain charges made by citizens of San Juan against the alcalde, which you had referred to me for such action as I might deem proper upon an investigation. My report was written in some haste, but the conclusions reached were based upon a careful and deliberate consideration of the documents sent to me for examination. Although this examination necessarily left with me some doubts as to his official integrity, nevertheless I was compelled upon the proofs before me to report to you, "that no evidence *has yet been disclosed* upon which I may justly base a criminal accusation against the alcalde." I also stated to you that the examiners of the treasury department, as well as the chief of the municipal bureau of that department, had informed me that they also were not then able to present specific evidence of fraud on the part of the chief officer of the municipal administration.

No one however could read the expediente presented to me without reaching the conclusion that the affairs of the municipality were in a state of disorder. I therefore reported to you that:

My investigation has disclosed the fact that for fully twelve months the public affairs of the municipality of San Juan have been in a disorganized, demoralized and corrupt condition; that the law has been consistently disregarded; that the municipal rules and regulations have been neglected; and that fraud has flourished unchecked by such supervision as should have been given to the various departments of the municipal government by the alcalde. The result has been much loss of public revenues raised from taxation of the people of the municipality. The loss amounts to many thousands of dollars, and the aggregate amount has not yet been ascertained and possibly may never be ascertained with accuracy.

But inasmuch as the dismissal of the alcalde at that time

would have separated him from his office only for a period of two or three weeks intervening before his new term commenced, such action then would obviously have been an ineffective adjustment of the situation, and I so advised you.

Since rendering that report the further investigations of this office have resulted in the production of proofs of such nature as to require the department to institute criminal proceedings against the alcalde. This action was taken by the Assistant Attorney-General during my absence from the country and without my knowledge. I now wish however to express my approval of his course and to assume such responsibility as may attach to it.

As the power is vested in you to take cognizance of the official delinquencies of alcaldes and, where the circumstances require it, to protect, by their removal, the public interests which they administer, it is proper for me to lay before you a statement in relation to the criminal charges made against the alcalde of San Juan as the case appears upon the expediente in this office.

Since my last report to you this office has obtained additional information as to the nature of the receipts so often said in late public comment to have been destroyed. It now appears that they were not blank documents, as I had first supposed, but that they had been filled in with the names of persons using city water, and with the amounts due from them respectively. The receipts had also been signed and therefore, in the hands of the collectors, they represented money for which the collectors would be lawfully liable upon their failure to return the receipts uncollected.

The Treasurer of Porto Rico, on the 29th day of June, 1902, issued specific instructions for the cancellation and filing in the municipal archives of such uncollected receipts. The alcalde of San Juan admits that he received this letter. It also satisfactorily appears that, only five days before the alcalde claims to have given the order for their destruction and while the municipal examiners were at work unearthing the frauds that were then existing under his administration, the alcalde was requested to produce the uncollected receipts for the use of the examiners in connection with their investigation. He agreed to do so. When they again made this re-

quest they were informed by the alcalde that he had ordered the receipts to be destroyed. And now, notwithstanding the evidence against him, which includes his own statements under oath, it is said that he is endeavoring to place the blame for the alleged destruction upon Mr. Holst, the municipal examiner, to whose zeal and energy is due the discovery of this great wrong against the people of this community. He had made contradictory statements under oath in reference to the alleged destruction of the uncollected receipts of such nature as to lead to the conclusion that they were wilful. Just how many of these receipts, if any, were actually destroyed is now being ascertained. That many of them were not destroyed is certain, for a large number of them are now in the possession of this office and others are in the possession of the treasury department. All of them have been identified as having been given to the holders upon the payment of the moneys due for the city water consumed by them. This money has not been accounted for to the people of the municipality, but has passed unlawfully into the hands of others.

There is a salutary principle of law expressed in the legal maxim "*Omnia praesumuntur contra spoliatores*." It may be applied most aptly to the alcalde of San Juan. The order for the destruction of the uncollected receipts was issued by him not only in contempt of the superior authority whose instructions he had received and, as it appears, for the purpose of obstructing the investigation then going on; but it was issued by him in contempt of the law which forbids the destruction of public documents and punishes it as a crime. All crimes may usually be traced to an underlying motive. The order of destruction given by the alcalde in defiance of authority was an act so unnecessary and so hostile to his own good name and reputation as to lead to the conclusion, under the maxim referred to, that it was given for no other motive than to prevent the discovery of the actual amount of the defalcation.

In my judgment this state of affairs is such as to require the immediate dismissal of Manuel Egozcue y Cintron from his office as alcalde of San Juan. And I so recommend.¹

¹ In accordance with this recommendation the alcalde was dismissed from his office.

In making this recommendation I feel that it is proper for your further information to explain in detail some other matters which do not appear in the criminal proceedings against the alcalde, but which seem to affect his official integrity and his capacity for the important responsibilities that rest upon him: On the eighth of October, 1901, Manuel Egozcue y Cintron, as mayor of the city of San Juan, addressed a communication to the Executive Council requesting, on behalf of his municipality, the confirmation of a project for issuing a municipal loan of \$600,000. Throughout the consideration of this petition the Executive Council and its various committees conferred with the alcalde as the administrative representative of the people of San Juan, and with no one else. And for the representations, reports and statements made by him in that capacity, the alcalde, in my judgment, should be held to a strict responsibility. The law requires it and common reason enforces this view.

In his report to the Executive Council of the necessities of the municipality and of the objects to which the proceeds of the proposed loan were to be applied, there is a false statement, as the treasury examiners indicate, aggregating the sum of \$43,253.47. Of this amount, \$32,820 is included twice *under different names*. It is included in the item "to refund the bond issue of January 1, 1897, \$264,000," and in the item "to fund the floating debt, including interest on said bonds to December 1, 1901, \$117,269.17." In addition to this false statement of facts there is a further sum of \$10,433.47 included as a floating indebtedness in the item of \$117,269.17, when in fact every dollar of that amount had been paid out of municipal resources before the bonds were issued. These two items together aggregate the said sum of \$43,253.47.

Finding himself in possession of that amount of money not required by the municipality, the alcalde requested the municipal council to transfer it to the common fund, and then proceeded to expend it unlawfully, disregarding every consideration of law and every consideration of respect for the Governor and the Executive Council of Porto Rico, whose official sanction to said loan is required under the law.

Here then is the sum of \$43,253.47 imposed upon the taxpayers of the municipality either through the wilful decep-

tion by the alcalde of the Governor and the Executive Council, or through incapacity for business affairs on his part so gross as to indicate his unfitness for such responsibilities. But this is not all. The people of this community for a period of twenty years will have to pay interest on that amount. This makes an additional sum of \$51,904.16. The principal and interest together aggregate the sum of \$95,157.63,—a heavy price for the people to pay, either for the wilful and wrongful act or the gross incapacity, whichever it may be, of their executive officer.

The third item contained in the alcalde's project was for \$50,000 for putting the water works in proper condition according to the original contract. He has had over a year and a half to consider and formulate plans for that important improvement. But at this time the fund remains practically unexpended, while the good people of San Juan pay the interest on it.

I now call your attention to the fourth item submitted by the alcalde for the consideration of the Executive Council in connection with the proposed bond issue. It is an item of \$60,000 for the construction of sewers in certain of the city streets. It is now understood that the contract for doing this work was let at about the sum of \$16,000. If this is incorrect, let it be assumed that the total cost of that work will be \$20,000. This leaves a balance in that appropriation of \$40,000 as an additional and unnecessary indebtedness upon the people of San Juan. If interest be added for a period of twenty years the people of the community will have to pay the further sum of \$48,000, or an aggregate on this account of \$88,000.

The fifth item is for \$25,000 for the construction of a home for the indigent poor of San Juan. So far as I am advised no such home has been constructed nor is such an institution now in contemplation. Nevertheless the interest on that large unused fund is now being paid by the taxpayers, and if it is not used for the purpose specified it must lawfully remain as a surplus in a municipal treasury for a period of twenty years, during which time interest aggregating a sum in excess of the item itself will have to be collected from the people upon whom the burden rests of supporting this community.

The sixth and last item in the project submitted by the al-

calde is for the sum of \$83,297.31 for paving and repaving the streets. In discussing this item your attention is called to the fact that the project for a loan was submitted to the Executive Council over a year and three months ago. If the alcalde of San Juan has any appreciation of the importance of his official duties, it seems reasonable to suppose that he took an additional period of at least three months, prior to submitting his plans to the Executive Council, to carefully examine and inform himself of the needs of the municipality in the matter of paving. In other words he must have commenced to consider the question of paving and repaving the streets at least a year and a half ago. At this date I am informed that not one block of paving has been done; that out of the appropriation of \$83,297.31 for this purpose, as estimated and secured by him, the alcalde has permitted to be expended for materials and for laying some curb stones, the sum of \$79,595, leaving the sum of only \$3,702.31 available for the payment of the labor necessary to utilize the material purchased.

The result therefore, in the matter of paving, of the official labors and deliberations of this official for a year and a half on behalf of the people whose public servant he is, has been to involve the taxpayers in the purchase of an immense amount of material which he is now not able to make use of. The appropriation was "*for paving and repaving of streets.*" The expenditure of practically the entire amount in the purchase of materials was either a deliberate disregard of the law and of his duty or a stupid blunder of an incapable official so extraordinary as to make it difficult to find a similar instance in the history of municipal mismanagement. And in order to relieve himself and the taxpayers of the embarrassments arising out of this wrong against the city and its people, he now proposes, for the payment of the cost of using the materials so purchased, to transfer the balance of funds arising from his blundering estimate of the amount necessary for sewers. He also proposes to use for the same purpose the bonus received from the purchasers of the bonds as a mark of their confidence in the municipal corporation, whose good name and excellent financial credit the alcalde has done so much to destroy. He proposes to do this notwithstanding the express provision of the law that all moneys received from the issue of bonds "must be

used *only for the purpose specified in the ordinance authorizing the loan.*"

This extravagant expenditure of money paid out of the pockets of others is accompanied by an extraordinary looseness and laxity in the keeping of the municipal accounts. I will not detain you with further references to the disgraceful condition of the water works department and the crime that has resulted from the alcalde's inattention to his duty in connection with that important branch of the public service. There is every probability however that corruption and disorder have existed in other branches of the public service. The treasury examiners on the papers before me show that considerable sums of money have been collected from the market stalls, while no appropriate account has been kept of such receipts by the alcalde's subordinates; that for the use of the slaughter house, revenues have been received and an account kept which cannot be checked up. It is also true, as stated by the examiners, that the law of accounting for a long period of months was consistently violated with respect to the collections from (1) the corral for animals, (2) for certificates and certified copies of records, (3) for licenses of lawful games, (4) for vehicles, (5) wagons, (6) stalls on the streets and plazas, (7) for licenses for peddlers, (8) for dog licenses, (9) for ball licenses and (10) licenses for public exhibitions. In all of these bureaus the municipal authorities formerly kept their accounts without regard to the requirements of law and in such manner as to make it now impossible to ascertain with exactness whether more funds were received than have been accounted for. In addition to this it appears that, without the authority of law, he has levied administrative fines, which have been collected and an account kept in such manner as to make it now impossible to tell by whom they were paid or for what supposed offense; and in such manner as to make it impossible to tell whether more fines have been collected than are now accounted for.

I should be glad at this point to withdraw this matter from your further attention, but there is still another phase of it, the significance of which is such as to require me to mention it. It is said by the alcalde and by those who are lending their support in defense of the charges pending against him, that the re-

sponsibility for these disorders in municipal affairs rests not upon him but upon his subordinates. As I understand the proceedings in the District Court of San Juan, the alcalde is charged with personal participation in an act which, under the laws of the island, is a crime. With respect to the other matters referred to in this report, if the alcalde, as the chief executive officer of the municipality, in whom is vested the power of appointing and dismissing his subordinates, is unwilling to accept or denies his responsibility for their conduct, in my judgment, he does not understand his official position and is not fit to undertake its duties. His subordinates are not without responsibility, and some of them are now facing indictments in the courts. But it is a singular fact that the alcalde, even after the investigation had commenced, took no steps against the director of the water works, but permitted him to remain upon the pay-rolls of the city until he became a fugitive from justice. For weeks after the matter had become a public scandal throughout the island, the city treasurer, Mariano Pesquera, was also permitted by the alcalde to remain an employee of the city until he was suspended by the Governor. In fact, so far as I am advised, Manuel Egozcue y Cintron has never at any time throughout the entire period since the discovery of the frauds upon the city treasury raised his hand for one moment in vindication of the law or to secure the punishment of those whom he now says are responsible. I have yet to be advised of a single respect in which he has volunteered his aid to the municipal examiners. At every step they have had to find their way in unraveling the intricacies of this crime against the people. He has instituted no investigation on behalf of the municipality. At this moment, so far as I have been advised, he still remains inactive. And if he has made any public expression of his official interest in ascertaining the extent of the defalcation, or if he has taken any step to that end it has not come to my knowledge. I need not recall the fact that he retained in the municipal service for months, and until shortly before his conviction, a notorious disturber of the public peace; that Quentin Flores, removed by the Secretary of Porto Rico from his office of turnkey of the municipal jail, promptly found an asylum on the city pay-rolls; that Eladio Cepeda, another municipal jail official, is now under charges of having robbed a

prisoner ; that Benito Miro, lately a keeper of that jail, is now in prison serving a sentence ; or that three municipal inspectors were yesterday arrested for public disorder and threatening the police.

In my judgment, under the administration of Manuel Egozcue y Cintron, the public service of the municipality is now in a demoralized and corrupt condition, and good order in the community and the protection of public interests are not to be expected so long as he retains his office.

I have the honor, Sir, to remain,

Your obedient servant,

JAMES S. HARLAN.

The GOVERNOR.

TERRITORIAL GOVERNMENT—EXTENSION OF THE CONSTITUTION TO PORTO RICO—REPORT OF THE JUDICIARY COMMITTEE.

Under the insular constitution the people of Porto Rico have substantially all the constitutional guaranties that are enjoyed by the people of the United States, and by appropriate legislation have established for themselves all the rights that are traditional among free people.

Besides having powers of legislation even broader than that of states, it is entirely independent of the national system of taxation. Although under the protection of the central government as fully as the states, it is nevertheless not required to contribute to the national burdens. The tariff laws of the United States extend to Porto Rico and are enforced by officials appointed by the government at Washington; but all moneys collected from custom duties are covered into the insular treasury. In addition the people of the island are not subject to the federal internal revenue laws, and having established a local system of excise taxes, they are able to collect for insular purposes revenues which in the states and organized territories accrue to the national government.

The disadvantages that would follow upon the extension of the federal constitution to the island, or upon the creation for it of a regularly organized territorial form of government considered and discussed.

IN THE EXECUTIVE COUNCIL OF PORTO RICO,

March 11, 1903.

The Judiciary Committee to which has been referred House Memorial 4, petitioning the Congress of the United States to grant the island a territorial form of government to be called the Territory of Porto Rico, and House Joint Resolution 2, praying for the extension of the Constitution of the United States to this island by congressional enactment, has the honor to report as follows :

The resolution was offered "without prejudice to the prior and broader memorial tending to secure a territorial government for the people of Porto Rico." The memorial on the other hand frankly proceeds on the theory that the creation here of a territorial form of government "would establish the possibility of its transition into statehood." There is incorporated also in the memorial an alternate plan for the enlargement of the Executive Council to a body of fourteen members one half of whom shall be elected every two years. The resolution in other words requests the extension to us of the constitution while the memorial prays for a constitutional government.

Broadly considered the essential principle of each measure is that Porto Rico may be brought under the federal constitution in the same sense in which the organized territories are under the constitution.

Each of the two measures has received the sanction of the House of Delegates and seems to some extent at least to give expression to the hopes and aspirations of the people of Porto Rico. It is altogether proper therefore that the Judiciary Committee in presenting an adverse report upon them should make a full and frank statement of its reasons for reaching such a conclusion. And this is its obvious duty more especially, because each measure indicates not only a devotion and loyalty to the national government but an adherence, truly American, to the underlying principle of the constitution—that mankind is qualified for self-government.

Without having had the benefit of an opportunity of listening to the debates that attended the passage of the two projects by the House of Delegates, the Judiciary Committee is left to infer that the desire for the definite and full constitutional status of an organized territory is based either upon the belief that without it our progress as a people will be less rapid and satisfactory or upon the belief that there is something lacking in the advantages of our present position.

The desire to enjoy the highest political status that the federal system can give us is a sentiment that does honor to those that entertain it. But in the consideration of any proposed change in our general form of government and especially one so fundamental as that now suggested, those who represent the people in the legislative assembly are charged with the moral duty of examining the question, not from the standpoint of their personal sentiments but from the broader standpoint of the real interests of the whole people. And it is from that point of view that the committee proposes now to discuss the two projects.

If they are intended as practical measures to secure the removal of an impediment in our progress as a people, due to any defect in our present form of government or to the fact that we are not under the constitution, it is surely wise before giving our final sanction to them to ascertain clearly and precisely the nature of the impediment or defect, and then to understand

clearly what effect the remedy that is proposed may have upon our future happiness and prosperity.

Is there any real impediment to our progress or any defect in our present form of government? It is difficult to think that there is. The advancement of this island since civil government was organized has been remarkable and unique in the history of the United States. So far as our material condition is concerned the candid citizen will confess that the island and its people are going forward at a safe pace to an assured prosperity. So far as our educational interests are concerned it must be admitted that all is being accomplished that could reasonably be expected. The general peace and good order were never more marked than at this moment. The social and moral conditions of a people may doubtless be strengthened by the enactment of protective laws, but in a wider sense our welfare in that respect must rest upon our own individual efforts as good citizens and not depend for stability upon any system of statutes. Moreover such evils and defects as may exist in connection with our social and moral progress may be corrected under our present form of government as readily as under any other. If some of us therefore are of the opinion that in these moral, educational, material or social conditions we are not progressing so swiftly as had been hoped, the remedy lies not in a fundamental change in our system of government but in our own hands. We need no greater powers. Those delegated to us under the organic act are as ample as the powers of legislation enjoyed by any state. We need only to make use of them in order to bring out all that is noblest and best in our people. And if evils exist we have only to be diligent in legislating for their correction and zealous in enforcing the laws against those who offend their precepts.

But there is in fact no such impediment to our progress. And the motive for the introduction of these two measures is possibly to be found not in a supposed inadequacy of the present form of government but in a thought of a different nature. There is a wrong impression in the island of the dignity of the present form of government, a vague hope for something higher and better. And it is to be inferred from each of the measures now under consideration that a territorial government organized

under the constitution of the United States would be accepted as a fulfilment of that higher aspiration.

A desire to be admitted into the Union as a state is an unspoken tribute of loyalty to the Great Republic. It is a sentiment that is easily understood and appreciated by any American citizen. It is more difficult however to understand a willingness to accept a territorial form of government in place of the government that now exists in this island. For in the popular estimation in the United States a territory has no place of special importance in the American system. The memorial seems to indicate that the belief is entertained here that an American community must first be an organized territory before it may become a state. But this is an error. There is no such requirement in the constitution and precedent is against it. The state of Texas was admitted into the Union without first being made a territory.

A territory is an embryonic political status; a period of probation during which opportunity is given to the inhabitants to demonstrate that they are strong enough and have enough of intelligence and capacity to entitle the territory to be placed on an equality with the states. Generally it is a crude method for governing a frontier, a portion of the country that is sparsely settled and whose inhabitants have not yet reached the condition that entitles them to the dignity of statehood. It is government reduced to its lowest and simplest terms and is under more or less strict supervision by the government at Washington. The territory of Alaska for instance is organized without any local legislative body at all. It has only a governor, a judge, a marshal and an attorney-general, by whom the laws are administered and the welfare of the community protected. This crude structure of government has not been an unusual one in the history of the government of territories by the United States. And therefore it would not follow necessarily, should we be given the status of an organized territory, that there would be any change in our present form of government.

But there is nothing in the condition of the people of Porto Rico that makes it proper that this inferior form of territorial government should be imposed upon them. Besides being densely populated, for generations Porto Rico has sustained a social and political system as complex and complete as that of

the states of the United States. The body of laws upon which our property rights depend and which regulate the daily routine of our lives is as highly developed as the laws of any state of the United States. There have grown up under it a people of cultivation and wide intelligence. And in every respect our political and social progress has been on a higher plane than that of the ordinary territory of the United States. Even the most populous and commercially aggressive of the regular territories as they exist to-day is inferior in its form of government to this government, and inferior in the effectiveness of its system of laws for working out the destiny of its people in accordance with their own will and in accordance with the opportunities that are presented to them.

A clear appreciation of the character and importance of this form of government was evidently in the mind of the Attorney-General of the United States when he said in a communication to the Secretary of the Navy dated October 25, 1901 (23 Opinions, 564):

It is not needful in this case to withhold the analogy because the word "state" alone is used in this provision (of the constitution), for Congress appears clearly to have placed the territory of Porto Rico on the same plane as a state, in this respect at least, by its surrender of a large share of public property and functions to the local control.

The question before the Attorney-General was whether the President had the right to set aside a portion of the island of Culebra for naval purposes without the consent of this government. Although such power doubtless existed in Congress, nevertheless the recommendation of the Attorney-General was as follows:

It seems to me that the United States should obtain, in accordance with the usual methods of authorization by Congress, a transfer of such individual property rights as may be involved and a retro-cession *pro tanto* from the government of Porto Rico.

And Congress on July 1, 1902, took appropriate action with respect to the needs of the national government in Porto Rico, and this government within the past few days has responded by a legislative enactment yielding to the United States all title and jurisdiction in the lands desired for national purposes. Had Porto Rico been an organized territory of the United States the Congress would not have hesitated to have taken any of its

public lands for such purposes without waiting for a formal enactment by the territorial legislature.

In the organized territories the title to all public lands is retained by the United States and they are subject to its disposition. In Porto Rico on the other hand Congress has provided that all public lands not needed for military or other national purposes shall be granted to the insular government. This grant of absolute title is not accompanied by restrictions upon the power of disposition usually found when public lands are granted by the United States to territories and even to states. Our legislature has some powers in the enactment of laws that the legislatures of territories have not had. There is no limitation in the organic act against special legislation, a restriction to be found even in the constitution of many states. And in other respects citizens of a territory do not enjoy the same dignity of citizenship that belongs to citizens of states. The federal court of Porto Rico, for instance, is open to citizens of Porto Rico in proper cases, while in the organized territories there are no federal courts. And in the federal courts of the states a citizen of an organized territory may neither sue nor be sued in cases where the basis of jurisdiction is a diversity of citizenship.

In other respects we have an independence of action and of jurisdiction not given to territorial governments. Since the creation of a civil government for Porto Rico in no single instance, so far as the writer has been informed, has the government at Washington or any of its departments given instructions or intervened in our affairs. As the writer was leaving the United States to assume charge of his office in Porto Rico he requested instructions from the Attorney-General of the United States and was advised by that officer that he considered himself without power or authority over the Attorney-General of Porto Rico, and that the government of Porto Rico must work out its own difficulties. That as the committee understands it is the general view of the authorities at Washington.

The truth is that the insular government enjoys a political status remarkable and extraordinary in the advantages that accrue from it. And if we are wise we shall not endeavor to have those advantages taken from us, by praying for any form of

government hemmed about with limitations that would detract from our present fortunate condition. If we are wiser still we shall retain these advantages in silence and without giving forth the impression of discontent with our present form of government. In a letter lately received in this island by His Excellency, the Governor of Porto Rico, from a high official of the United States, who perhaps as much as any one else is entitled to the gratitude of the people of Porto Rico, the writer, referring to the Governor's desire for an enactment by Congress providing that the emigrant tax collected in Porto Rico by federal officials might be paid into the insular treasury, says:

Hawaii was made a territory and in consequence all her custom duties, internal revenue taxes and every other kind of tax, including those about which you cabled me, are collected for the benefit of the United States. The impression obtains here that Porto Rico has been greatly favored in being allowed exemption from our internal revenue tax and in being given her custom duties. I fear an effort to change the law so as to give you the collections under consideration, might fail so far as that purpose is concerned and lead to other changes that would make your situation less agreeable than it is.

These are significant words and they suggest that our wisest course is to be content with what we have.

The importance of our present advantages ought not to be overlooked. What other part of the United States, except the Philippines, is independent of the national system of taxation? What territory in the history of the United States has been relieved of its share of the burdens of national government? Unlike the states and territories Porto Rico is not required to contribute to the national defense or, with the single exception of the federal court of Porto Rico the budget of which is paid from the insular treasury, to make contributions for any other national purpose. We keep the customs duties collected at our ports and have our own internal revenue system. These taxes, which in the territories and states make large demands upon the energies and activities of the people and their commerce, have not been put upon us for the benefit of the government at Washington but for the benefit of the government at San Juan. And the internal revenue taxes we have imposed upon ourselves. The island of Porto Rico is free to pursue its development with all its resources unburdened by national exactions, while its people at the same time enjoy the assurance

that the national government will exert every power it has in its protection against foreign aggression or domestic insurrection. What relation could be more beneficent to any people or more calculated to enable them to work out their destiny to the best possible advantage? Every dollar of taxes accruing from our commercial activities and our accumulated wealth remains in the island to be utilized for the public weal in accordance with the policies established by our own legislative assembly. Hawaii on the other hand organized as a territory is now clamoring for congressional legislation which will put her people on a footing as favorable as that we now enjoy.

It is not wise to ask that these special advantages be taken from us. Nor must we cease to be grateful for the profound statesmanship that has fashioned for us a government embracing not only all that is essential in free government but also giving to us these unusual and bountiful privileges.

Your committee is aware of the fact that the creation for this island of a government to any extent outside of the constitution and resting largely upon the discretion of the Congress was at one time the subject of animated debates and wide differences of opinion in the United States. It is aware also that the establishment for our own benefit of a duty upon Porto Rican products as they entered the ports of the United States and a duty upon products of the United States entering the ports of Porto Rico was the occasion of keen public discussion. Practical experience however has demonstrated the wisdom and forethought of those that were responsible for that adjustment of our relations with the national government. Situated alone in a far-off sea without the benefits of the intimate geographical proximity and the close contact in commercial activities that are enjoyed by the states, our economic condition is very different from that of the states and territories. The extension to us at that time of the clause in the constitution requiring uniformity in taxation would have been more devastating than the great hurricane. Its results at this time would be equally disastrous. The imposition upon us of the internal revenue system of the United States would destroy our industries, and the absorption of the large annual taxes collected under that system, as well as the absorption of the revenues now accruing to us from customs duties, would make it impossible to support the

highly organized government now existing here without throwing upon real estate and industry an extraordinary and crushing burden of taxation.

With the present conditions undisturbed there is no limit to what may be accomplished in the future for the good of the people of this island. If our products and our industries and our energies may remain unburdened for national purposes and be taxed only for our own benefit and only as our own legislative authority shall direct, our schools will multiply, our roads be lengthened and in every other way we shall be able to work out the highest development of which we are capable.

II.

In the preceding pages your committee has endeavored to set forth in a brief way the advantages accruing to the people of Porto Rico from the present form of government and to show how greatly our position exceeds that of an organized territory. But the disadvantages that will follow, should the constitution in all its parts be extended to us by congressional enactment as requested in the Memorial and the Joint Resolution, present the more serious side of this question.

Our insular constitution and the body of our laws give to us now all the constitutional guarantees enjoyed by citizens of the United States. We can by appropriate legislation give to ourselves anything that is lacking. The bill of rights enacted by the legislative assembly contains in fact all the rights that are traditional among free people. And should the constitution be extended to us to-morrow we would not know or be able to realize any change in our condition except by the disadvantages and responsibilities that would immediately follow in the path of some of its provisions; unless indeed we are willing, in asking for and in receiving the benefits of that great instrument, to become at the same time a mendicant for financial aid at the doors of the national treasury, a position which the people of this island do not desire and an attitude which no other American community has ever assumed.

It is not the purpose of the committee to set forth in exhaustive detail the unfortunate results that would follow should Congress act upon the Memorial or Joint Resolution, but it is well

and wise to some extent at least to consider the question from the point of view of our annual budget.

During the fiscal year ending June 30, 1902, as shown by the report of the Auditor of Porto Rico, there was collected for insular purposes from the regular and ordinary sources of income the gross sum of \$2,202,531.50. Of this gross sum the amount received from the regular property tax was only \$407,414.05. From the customs there were collected by officers of the United States the sum of \$848,258.30. But under the terms of the organic act every dollar of this amount was turned into the insular treasury to be disbursed for the benefit of the people of Porto Rico according to the will of their own legislature. There was also collected by insular officials from the excise tax on spirits, tobacco and other products of our soil and industry the sum of \$947,859.15. It thus appears that the sum of \$1,795,117.45 was collected from customs and internal revenue taxes during the last fiscal year. This is four times the amount of the gross tax upon real property. In fact it was \$165,461.25 in excess of four times the amount of the real estate tax.

Upon the most conservative estimate it is believed that the customs and internal revenue taxes for some years to come may be relied upon to produce at least as much as the \$1,795,117.45 collected last year. This entire sum would be taken from us should a regular territorial government be granted to the island. Under paragraph 1, section 8, of article 1 of the constitution of the United States, there is delegated to Congress a power expressed in the following language:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States.

Under this provision the internal revenue system of the United States would at once extend to the island of Porto Rico. The federal system must be "uniform throughout the United States." And Porto Rico being thus made a part of the United States in a full constitutional sense would find its industries immediately burdened for the benefit of the national treasury by the internal excise taxes provided by federal legislation for the states and territories. Indeed the sum thus taken from us would be largely in excess of the gross amount last

mentioned; for the larger part of the \$946,859.15 collected by the insular government in the form of excise taxes was derived upon rum at the rate of \$0.60 cents a gallon and upon manufactured tobacco at the rate of \$1.80 a thousand for cigars and \$1.00 for cigarettes; while the officers of the United States would collect here under the federal system of excise taxes at the rate of \$1.10 upon each gallon of rum and \$3.00 a thousand upon cigars and \$1.50 upon cigarettes. It is not improbable in fact that under the more burdensome federal system our people would be required to pay into the national treasury, by way of excise taxes alone, a sum almost equal to if not in excess of our present insular revenues from all sources. But the national system would not stop with the collection of a large tax upon the manufacture of rum and cigars. It would burden also with a license tax every citizen who sells either rum or tobacco by retail. Even the push carts on the streets where cigars are vended could not lawfully continue in existence without paying a tax to the government at Washington. In addition to the large tax upon distilled spirits the federal excise law requires each distiller to have a bonded warehouse attached to the distillery premises, which is put in the absolute charge of storekeepers and inspectors appointed by the federal government, although the proprietor of the distillery is required to pay their salaries. Of the two hundred distillers of rum the large majority would be forced to discontinue, and of the two thousand small manufacturers of cigars ninety per cent would have to close their factories.

It is not necessary to enlarge upon these details. But it is not difficult to see from what has been said that in order to continue with our schools and roads and the other activities of government this great deficit in our budget would have to be made up by additional taxes upon real estate and upon occupations. These exactions would be so heavy that we should be forced at once to choose between giving up some portion of our school system and some portion of our road extension or the imposition of taxes so burdensome as materially to check our prosperity. Moreover it is difficult to see how this large sum of about \$1,800,000 taken annually by the national government from our circulating medium could be readily replaced unless the balance of trade should immediately turn in our

favor, a result not to be expected in view of the check that our industries would suffer from the imposition of such taxes.

It is within the recollection of those who read and think and follow public discussion in the island that when the Hollander Bill imposing a regular tax upon real estate and personal property was introduced and passed, those owning accumulated property thought that a serious attack had been made upon vested interests in the island. Although this feeling has passed away and intelligent men recognize the justice of a system that imposes a large share of the burdens of government upon accumulated wealth rather than upon the strength of the living man, increasing by a direct consumo tax the cost of what he eats; nevertheless the feeling is quite general that the present tax upon vested property rights is a burden that ought not to be largely increased until conditions of commerce and agriculture shall have radically changed. And the prosperity of our agriculture and commerce is the living force that vitalizes the island and supports its teeming population. Destroy that or impose great burdens upon it and you bring suffering to every man, woman and child in the island. And yet this is what will happen should the Congress give to us a territorial government regularly organized under the constitution of the United States as other territories are organized.

Our annual receipts from all sources approximate \$2,300,000. If the regular real estate tax which produces a little more than \$400,000 a year be doubled, the result will be an annual revenue of say \$800,000, leaving a balance of \$1,500,000 in round numbers to be collected from other sources if we are to continue our public governmental functions on their present basis. If the real estate tax be increased three times, thus producing about \$1,200,000, there would still remain to be collected the sum of \$1,100,000 in order to carry on our schools, maintain our roads, look after the public health and continue the other various activities of government as now established. Such a tax as this would amount to confiscation. And it is scarcely necessary to say that the effort, in addition to the national internal revenue tax on rum and tobacco, to raise this sum of \$1,100,000 a year on personal property and upon occupations would utterly fail. We have no foundries or manufactories or great commercial establishments to contribute to the

burdens of government. The island is a purely agricultural country with the soil and its products only to draw on in the way of taxation. An increase to that extent of the tax upon real estate or upon personal property is an impossible proposition.

Before leaving the question of the disadvantages that would accrue to us should Congress act upon these projects, candor requires the committee to refer briefly to another result that would follow the creation here of a regular territorial government.

Under the sixth amendment to the constitution of the United States it is provided that in all criminal prosecutions the accused shall enjoy the right to a trial by jury. Under the seventh amendment it is provided that in all civil suits where the amount in controversy exceeds the sum of twenty dollars the issue of fact shall likewise be submitted to a jury. If we become a regularly organized territory, in every criminal prosecution, except for petty offenses against municipal regulations and ordinances, a jury will be required to intervene even though the accused may expressly waive that right. In the states of the United States the matter of trials by jury is subject to a large extent to legislative action; and the tendency in many of the states is to curtail and limit the intervention of juries both in criminal and in civil matters. But in the territories these fixed provisions of the constitution of the United States exclude the territorial legislative authority from making any substantive modification of the right to a jury trial. It must be understood therefore that should a territorial government be created for us, practically in every criminal case a jury must decide all issues of fact, and in civil cases involving the value of over twenty dollars a jury trial may be demanded by either party as a constitutional right.

We must not conceal the truth from ourselves. While the committee entertains no feeling of despair, the operation of the jury law has not been altogether satisfactory. And this has been the subject of wide public comment in the island. Your committee has not endeavored to analyze the causes of these unsatisfactory results and this is not a proper occasion for doing so. But in this connection the committee feels it necessary to invite the attention of the council to the fact that there exists in this island an unusual percentage of people who are able

neither to read nor to write. Side by side with the highest cultivation in social, professional, literary and technical matters there is an extraordinary degree of illiteracy. Those that have had occasion to examine the question and to mingle with the general mass of the people realize that this ignorance is due to the lack of opportunity and is not the natural ignorance that exists in some countries in the face of the most ample systems of education. Our school system is already making rapid inroads upon it and in the not distant future the census statistics will tell another story. Nevertheless it exists, and those citizens whose love for the island and its real welfare does not prevent them from recognizing the facts as they are, will look with apprehension upon the further extension for the present of the system of trials by jury.

III.

Higher than the material and practical considerations that have been suggested in the foregoing pages is a further thought. The organic act commonly known as the Foraker act was conceived in wisdom and enacted by the Congress of the United States under a profound desire to do for the people of this island the utmost that wisely might be done. The completeness of that act as a constitution and the adequacy of its provisions for meeting all the requirements of government in clear and precise terms have exhibited in the highest degree the skill and statesmanship of those that drafted it. Under its provisions we have made safe progress in the past. We may well trust to the wisdom of the government at Washington to provide for our future welfare. A conservatism on our part now will be more likely to inspire confidence in us at Washington than a hasty demand for a new form of government only three years after the creation of the present government.

The desire expressed in one of the bills under discussion for citizenship in a full constitutional sense is one that gratifies every true American in the island or out of it. But whether in its wisdom the national government shall in the future deem it wise to make us citizens in that sense is a matter about which your committee does not wish to make any conjecture. If in due time it may be done without injury to our own welfare or to any policy involving the welfare of the nation at large, we

may confidently rest in the assurance that it will be done. For the government at Washington is a government of the people, and its past history shows that it has been perhaps too ready to confer without discrimination the benefits of citizenship on all that come to its shores. It has already given us every substantial benefit of real citizenship. If it has seen fit to reserve the mere statutory declaration of citizenship, this has been done for our advantage and for our benefit, as well as in the fulfilment of a national policy. It remains for us now to take no selfish view of these great questions but by recognizing their national importance to show our appreciation of the proposition that we are so much a part of the nation at large that what is important in public policy to the whole nation is important to us as a part of it.

For these reasons the Judiciary Committee recommends that the consideration of both measures be indefinitely postponed.

Respectfully submitted,

JAMES S. HARLAN, CHAIRMAN.

JOHN R. GARRISON.

For reasons which I shall verbally express upon the floor of the Council I find myself unable to concur in the conclusions of the majority of the committee in the above report.

JOSÉ DE GUZMAN BENITEZ.

Committee on the Judiciary.

ANNUAL REPORT
TO THE
GOVERNOR OF PORTO RICO
MAY 1, 1900, to APRIL 1, 1901.

OFFICE OF THE ATTORNEY-GENERAL OF PORTO RICO,
April 1, 1901.

SIR: Your communication requesting a formal report of the acts and doings of this department during the past year reached my hands on the second day after I had assumed charge of this office. On the same day the Acting Attorney-General who, with the exception of a period of about four months, had conducted the affairs of this department during the past year, took his departure for the Philippines. Of necessity therefore this report must be of an informal character.

ROUTINE WORK OF THE DEPARTMENT OF JUSTICE.

The work of this office is laborious and involves much detail for the reason that it comes into close contact with the entire judicial system of the island, the fiscals or prosecuting attorneys of all the municipal and district courts being directly under the authority of the Attorney-General and, in criminal matters against public officials, acting under his personal supervision.

In the performance of its duties in connection with the courts, the department during the past year has received and answered nearly 4,300 communications; many of these communications consisting of formal denunciations or indictments of public officials and containing not only the formulation of the charges but the testimony in support of them. All of these matters as I am informed have had careful consideration. The number of criminal matters against public officials thus considered and dis-

posed of was one hundred and twenty-one. In a number of cases convictions were secured, but in the majority of cases the defendants were acquitted. I am advised that this result was due in some cases to a failure of proof and in others to the weak character of the charges.

In addition to these duties the Attorney-General is the legal adviser of the governor, the executive council and of the several departments. In that capacity during the past year the department has received and answered a large number of communications and has rendered two hundred and seven opinions on legal matters submitted to the office in which interpretations of laws, etc., were required for the guidance of the several departments.

This department has also considered and acted upon three hundred and twenty-eight applications for pardons during the past year. It seems that upon the American occupation the general in command, upon establishing a provisional government under military authority, found the jails filled with prisoners, many of whom had been in confinement without trial for long periods of time, in some instances covering many years. Indeed I am informed that in some cases prisoners had been in jail for so long a time that all record of the charge under which they had been imprisoned had disappeared. Under these circumstances the officer in command felt it his duty to grant a large number of pardons. This action seems to have left the impression upon the men who have since been convicted that the new government would exercise the same clemency upon slight provocation. Petitions for pardon have as a result been numerous and the reasons assigned in many cases frivolous. In one instance the wife of a prisoner who had escaped from prison and was still at large requested his pardon on the ground that by escaping her husband had thus relieved the insular government of the expense of supporting him. It is also apparent that the real theory of criminal punishment is not always understood. Some of the petitions for pardon are signed by the injured person and this in several instances was assigned as a sufficient ground for clemency, the fact that the offense may have been against the public peace and order being entirely overlooked. I find however that few pardons have been granted during the past year, although each petition has been carefully considered

and in addition the department has made efforts to advise itself thoroughly of the nature of the crime and the evidence upon which conviction was had.

INSULAR JUDICIAL SYSTEM.

Heretofore all persons arrested for petty offenses have been tried before the alcaldes or mayors of the respective municipalities. As the alcaldes were elected by the residents of each municipality, and as political feeling in some quarters is very intense, this system is said not to have proved thoroughly satisfactory. It is said that political considerations have entered into the performance of the duties of the alcaldes as police magistrates. However that may be, the legislature abolished the entire system at the first opportunity and created instead separate police magistrates. These officials are compensated for their services, not under a fee system, but by a definite salary established under the law. It was thought wise by the legislature absolutely to remove these police magistrates from connection with local politics, and instead of providing for their election by the people of the several municipalities, the law provides that they shall be appointed by the governor. The law goes into effect on this date (April 1), and the appointments having been made, the judges will enter upon the performance of their duties at once. It is believed that the separation of police magistrates from local political influences, making them responsible directly to the governor by whom they may be summarily removed, will prove more satisfactory than the former system.

There are sixty-seven of these courts, each municipality having a municipal judge being entitled also to a police magistrate. The greatest imprisonment that may be inflicted by police courts is six months, and the highest fine \$15.00. The offenses of which the police magistrates may take cognizance are of a petty nature, such as the throwing of stones; staining of public statues or fronts of buildings or doors, and general offenses of a malicious nature or which partake of the character of a nuisance such as riding a bicycle without a bell or whistle; the forming of groups upon the sidewalks; obstructing public roads; reckless driving or riding; the use of foul words or language; putting a heavier burden upon carts than can be well

drawn by one horse or one yoke of oxen, as the case may be; firing arms without authority; making noises with horns or bells; holding tumultuous meetings; disturbing the order of theaters; and other such offenses that come within the general term of disorderly conduct, including offenses against general municipal ordinances relating to cleanliness and to decency and propriety of conduct on the public highways.

MUNICIPAL COURTS.

The municipal courts of the island correspond in some respects to the office of justice of the peace as established in most of the states of the United States. Their jurisdiction in civil matters is limited to the sum of \$400. In criminal matters they have jurisdiction over criminal offenses or misdemeanors established by the penal code, such as petty thefts in which the loss does not exceed \$5 and offenses against property, etc.

An unusual provision in respect to criminal cases is one giving the municipal courts jurisdiction in cases of assault which result in wounds; if the wound shall have completely healed within fifteen days the municipal courts have jurisdiction, but if the wound shall not have completely healed within fifteen days the offense is considered one of more gravity and is cognizable only by the district court, which is a court of much greater dignity.

DISTRICT COURTS.

There are five district courts in the island, their jurisdiction being limited in civil and criminal matters by certain territorial lines substantially equivalent to county lines in the United States.

In civil matters the district courts are courts of general jurisdiction, all cases in which the amount involved exceeds \$400, coming within their cognizance. In criminal matters they have cognizance of offenses of greater gravity than the offenses heretofore enumerated in connection with the jurisdiction of police magistrates and the municipal courts.

In each of these five district courts three judges sit, one being designated as "Presidente" or presiding judge.

These courts are also charged with the functions usually performed in the United States by probate courts, and have juris-

diction over all matters connected with bequests and legacies and the inheritance of property both real and personal.

The District Court of San Juan, besides the duties performed by the other district courts has also cognizance of what are called "contentious administrative cases." In other words it is a court of claims in which all matters in dispute between citizens and the insular government may be heard and disposed of.

The dockets of all of these district courts are very crowded and consequently they hold daily sessions, and under the law have no right to a vacation except on Sundays and official and religious holidays. About two thirds of the cases now pending before them are of a criminal character.

Up to the day on which this report is dated a trial by jury has been unknown in Porto Rico. Hence in important criminal matters and especially in those involving the death penalty the responsibility resting upon the judges of these courts has been very great. This responsibility was fully appreciated by the Spanish Government as is shown by an old Spanish law not now in force because superseded by the general orders of the provisional military government established by the United States, that in any criminal case whether involving the death penalty or not, where two only of the judges agreed and the other dissented, the penalty next inferior to the penalty voted for by the two concurring judges was the penalty enforced, and therefore where two judges voted for the penalty of death in a murder case and one dissented, a life sentence was the necessary result. The responsibility of the three judges was not so great however as to prevent Spanish judges from frequently decreeing the penalty of death. I understand that this penalty was often inflicted. Since the American occupation however it seems that while the judges of the district court have not hesitated to decree the death penalty in cases involving malicious or atrocious features, such sentences have been less numerous; but as the jury law goes into effect on this date the responsibility heretofore resting upon the judges of the courts will to a large extent be transferred to a jury of twelve men.

As an illustration of the business done in the district courts I call your attention to the following schedule furnished me by the clerk of the district court of San Juan covering a period

from May 1, 1900, of the establishment of the present civil government, to the date of this report :

MAY 1, 1900 TO APRIL 1, 1901.

	NUMBER OF CASES	DISPOSED OF	PENDING
Criminal cases	956	802	154
Civil cases	350	113	237

It will be observed that a large percentage of the cases heard by the district court of San Juan were of a criminal nature. This is true of all the district courts. While this indicates that much crime exists in Porto Rico, I have reached the conclusion from all the inquiries that I have been able in this short time to make, that the excessive percentage of criminal cases is due to the special conditions that have prevailed here during the last few years rather than to a permanent condition of criminality among the people. The Spanish-American war and the hope of the people of Porto Rico to be released from the dominion of the Spanish government undoubtedly led to some cases of aggression by the Porto Ricans against the Spaniards then resident in the island. Many cases of that nature were before the military courts and some are still pending before the courts of the present civil government. The unrest following the change of sovereignty which is doubtless one of the results of all military activities, has led to other acts of crime and probably a few cases of that nature will continue to arise until the population is adjusted more fully to the new order of affairs. The great destruction of property and loss of life following the hurricane of August 8, 1899, and the lack of employment resulting from the destruction of coffee and sugar plantations that prevailed for a few months after this occurrence, were also undoubtedly responsible for a number of offenses against law and order and against persons and property. It is believed however that such breaches of law will grow less frequent as soon as conditions improve and the criminal classes shall be given to understand that the laws will be enforced with a firm hand. In fact the improvement in general conditions is already manifest as will clearly appear from a schedule of the business done by the same court from August 10, 1899, when the court was created by military authority, to May 1, 1900, when the

present civil government assumed charge of the island, a period of only eight months, commencing just two days before the great hurricane.

DISTRICT COURT OF SAN JUAN.

AUGUST 10, 1899, TO MAY 1, 1900.

	NUMBER OF CASES	DISPOSED OF	PENDING
Criminal cases	1438	1334	104

A comparison of the above schedule covering only eight months with the schedule of the same court, heretofore given, covering a period of eleven months, will give very satisfactory evidence of the great improvement in the condition of the people, and the marked decrease in the number of offenses against law and order. There are but five female prisoners on the whole island.

An unusual feature of the procedure in criminal cases is that the evidence is not preserved in a bill of exceptions but is set forth in substance and minutely in the judgment itself. The judgment is therefore a lengthy document, and though this feature of the procedure here has been much criticised, so long as the evidence is not otherwise preserved the judgment cannot well be condensed.

The judgments which are called "sentencias," are divided into three parts; the first part called "resultando," contains a statement of the facts as found by the judges from the evidence; the second part called the "considerando" consists of the application in a very logical manner of such laws as may be involved upon the facts and finally indicates argumentatively what the decision must necessarily be; then follows the decision or third part called "fallo."

These "sentencias" or final judgments are prepared with the strictest care, and in language and phraseology are generally models of elegant diction and of the faultless use of words.

THE SUPREME COURT.

Appeals in criminal matters from the police courts and the municipal courts may be taken to the district courts and their conclusion is final. In criminal matters which are cognizable in the first instance in the district courts, an appeal may be

taken to the Supreme Court of the island, but the only evidence that reaches the latter court is the evidence preserved in the "sentencia" or judgment, as pointed out above. It follows therefore that the Supreme Court must accept the statement of facts thus prepared by the lower court. No latitude is given nor is there opportunity for a reversal of a judgment by the Supreme Court on the facts. There is left for its consideration only the application of the laws to the facts thus found. It is merely a court of cassation. In the absence of an intermediate tribunal, where the facts thus ascertained by the trial court and set forth in its judgment might be reviewed upon the evidence, it would perhaps tend to a furtherance of justice if the Supreme Court were made a regular court of appeals so that each case could have proper consideration in that court upon the merits. Matters of fact which may have escaped the attention of the trial court and in which there may be manifest error, cannot now be considered by the Supreme Court except as a court of cassation.

In civil cases in the Supreme Court the evidence appears of record and can be considered by the court in reaching a final conclusion; but the evidence usually comes to it in a narrative form. It often contains however original documents which may be consulted. The record is not required to be printed nor is it prepared in duplicate. But one copy reaches the court and consequently it is passed around from hand to hand among the five judges and the lawyers representing the respective parties.

I desire to call your special attention to the fact that in criminal cases an appeal may be perfected to the Supreme Court simply on a motion by the defendant. No costs are required to be paid; no bond is demanded; no brief is necessary. Nor is it necessary for the defendant to have a lawyer to appear on his behalf in that court. Nevertheless the court must give to such a case the same consideration that it gives to any other appeal and must set forth its judgment with the same elaboration and care that it would give to a contested case. The result is that in every criminal case an appeal to the Supreme Court is perfected as a matter of course. In the meantime the accused may be enjoying his liberty on bail. A further result is that the docket of the supreme court of the island contains

more cases of a criminal nature than of a civil nature. Under the Spanish government defendants in criminal cases were required indirectly to pay costs because of the rule which made it necessary for the records to be prepared on stamped paper. With the abolition of stamped paper by the American administration all costs have disappeared.

Matters heard and disposed of by that court during the last calendar year are set forth in the following schedule :

SUPREME COURT OF PORTO RICO.
DECEMBER 31, 1889 to DECEMBER 31, 1900.

	NUMBER OF CASES	DISPOSED OF	PENDING
Civil	133	102	31
Criminal	216	180	36
Administrative	22	21	1
Total	371	303	68

There are 378 officials and employees in the entire judicial system of the island; the appropriation for the next year including contingent expenses is \$178,150. Of the whole number of employees there is not a single American; of the whole number of judges there are but four Americans, a fact which is of interest in that it indicates the general policy heretofore pursued by the Civil Government in this department of putting responsibility so far as possible upon the Porto Ricans themselves. Of these four Americans, one is an Associate Justice of the Supreme Court of the island. Up to the first day of March last he was the sole representative of the American bar on the bench of Porto Rico. On account of his ability and learning both in the common law and in the civil law, he has been peculiarly useful in helping to shape the jurisprudence of the island to the new conditions of government. The other three American judges have been appointed within the last month to the districts courts which are next in importance to the Supreme Court. It is hoped that their presence in these courts of general jurisdiction will aid in bringing the two systems of jurisprudence wherever they may come into conflict into some sort of working harmony.

The judicial system of the island has lately been the subject of adverse comment in the United States. Although my op-

opportunities for observation have been limited to a short period of time, I am nevertheless of the opinion that such comments are not fully justified by the facts. It is probably true as has been said in the United States by the same critics, that no court that ever existed in Porto Rico enjoyed the confidence of the whole people more fully than the late provisional court established by the military authorities and consisting entirely of American judges. It is probably also true that the desire is now observable on the part of the Porto Ricans themselves to take their cases to the United States District Court whenever possible because they feel that without regard to political or other considerations justice will be there administered. It is also probably true, that with respect to their own insular courts the same confidence does not exist; it is said, and it is probably true, that in some of these courts and in some cases political considerations do sometimes influence results. This seems to be the belief not only of the Americans here but of the Porto Ricans themselves. This, however, is to be said: that the Porto Ricans are as well aware of these defects as the Americans and there seems to be a genuine desire and effort to improve the judicial system, not only in the honest administration of the law but in the law itself. The Supreme Court of the island, which is the court of last resort, seems beyond question to enjoy the esteem and respect of the people without regard to party. This affords strong ground for a hopeful view of the situation and my belief is that American capital may be invested here with the confidence of protection by the courts. But whether the judicial system as now established which preserves the old Spanish law to a large extent, will be sufficient to meet the requirements of the new commercial activities which are confidently expected is a question for future consideration. By many of the American lawyers here it is thought that it would have been wiser at once to have provided a system of American law for the island; by others it has been said that so radical a change would have worked a great hardship. I do not feel that I have been here long enough to venture an opinion on so important a question, but as the relations between Porto Rico and the United States will grow closer as time goes on, it is apparent that some modifications bringing the two systems of law into closer harmony so that

the judges will have some understanding of each system and the methods of thought and construction which each system requires, are absolutely necessary.

Very respectfully yours,

JAMES S. HARLAN.

Attorney-General of Porto Rico.

To the GOVERNOR.

ANNUAL REPORT
TO THE
ATTORNEY-GENERAL OF THE UNITED STATES
OCTOBER 1, 1900, TO SEPTEMBER 30, 1901.

OFFICE OF THE ATTORNEY-GENERAL OF PORTO RICO,
November 10, 1901.

SIR: Section 21 of the act of the Congress of the United States, entitled "An Act to provide revenues and a civil government for Porto Rico, and for other purposes," approved April 12, 1900, requires the Attorney-General of Porto Rico to "make such reports, through the Governor to the Attorney-General of the United States as he may require, which shall annually be transmitted to the Congress."

In compliance with this provision of law I have the honor herewith to present to you a report of the acts and doings of the department of justice of Porto Rico, as well as a report as to the work and proceedings of the judicial system of the island, for the year beginning October 1, 1900, and ending September 30, 1901.

DEPARTMENT OF JUSTICE.

Prior to February 11, 1898, when by royal decree the government of this island was reorganized and five departments of government created, among which was the department of "gracia, justicia y gobernacion," the general duties that are now performed in this office pertained to the functions of the presiding judge of one of the three insular courts of general jurisdiction. As a separate department this office has therefore a history of only three years and one-half. By General Orders No. 12, of the series of 1899, there was created by the general in command of the military forces of the United States in this

island, the department of justice, with a secretary of justice at its head. Subsequently that office was discontinued and the department was put under the control of a judicial board of five members of the legal profession, serving without salary, and assisted by a solicitor general. Later, and in contemplation of the organization of the present civil government, the department was continued in force and, by military order, the office of attorney-general was created.

To this official, whose status was more definitely defined in section 21 of the organic act, are delegated all the powers and duties customarily exercised by an attorney-general of a territory of the United States. He is required also to perform such other duties as may be prescribed by law.

This provision of law, while rather broad in its requirements, does not fully disclose all the duties of the Attorney-General of this island, or indicate with clearness the extent of the functions of the department of justice. For, besides being a member of the executive council, which is the upper house of the insular legislature, in which he is required to perform laborious legislative and administrative duties, the Attorney-General has inherited under the Spanish law official labors analogous to those exercised by the secretary and minister of justice under the autonomic constitution granted by Spain under the royal decree above mentioned.

One rather curious group of such inherited functions is the examination and disposition of petitions for dispensation of the right to cousins to contract matrimony, or as they may be more accurately defined, petitions for a waiver of the impediment placed by law in the way of the marriage of cousins or those related in a closer degree of consanguinity. On assuming charge of this office I found that since the promulgation of the autonomic constitution it had become the practice to address such petitions to the department of justice, and that almost without exception and as a matter of course, these petitions had been granted by the head of the department. A close examination of the law developed the fact that the power to grant such petitions was lodged in the government, and not in a single member of the government. I have, therefore, with the concurrence of the governor and the executive council, transferred these duties to the judiciary committee for its

report to and action by the executive council. This department however continues to make the examinations necessary as the foundation for such reports by that committee.

Under the terms of General Order No. 16, of the series of 1899, which still has the force of law, there was delegated to the department among other duties, that of recommending the repeal of laws that were unnecessary or that interfered unnecessarily with personal liberty. While during the past year this department has had no opportunity of recommending amendments of laws to the legislature, it has had occasion and has not hesitated to declare certain laws of that nature to be no longer in force, on the ground of their general inconsistency with the form of government now established in this island.

The same General Order makes it the duty of the head of this department to prepare laws and systems in accordance with those in vogue in the United States. The department has, however, been relieved of this duty by the appointment of a code commission, which has now under consideration a general revision of the whole body of laws.

In addition to those functions the Attorney-General is the legal adviser of the insular government and of the heads of departments; and during the past year much of the time of the department has been consumed in the preparation of opinions for the guidance of other departments, and in the preparation of contracts and other documents in which they were interested.

Among the more important duties which I am called upon by law to perform is that of investigating claims against the insular government, and of investigating the title to its public lands; and during the past year at least one important suit involving the title to public lands of considerable value has been carefully investigated by the department and is now about to come on for trial in one of the insular courts.

Besides being the legal adviser of the various branches of the government, the Department of Justice to some extent seems also to be the legal adviser of the public at large. In the time of the Spanish domination the practice of securing redress and enforcement of individual wrongs or rights by means of an attorney retained by the parties in interest, seems

not to have been so firmly established as it is in the United States; the result is that this department, rather more frequently than the other departments of the insular government, has been applied to for relief in cases of alleged private wrongs. This is a duty which in no way comes within my official functions as defined in the Foraker act or in the local law; but the belief seems to be widely entertained that such petitions will have attention, and this office has rendered aid when it seemed proper to do so. As an instance I may refer to the recent adjustment by the department of a dispute between adjoining property owners arising out of the closing of an ancient pathway. Another complaint was from a naturalized citizen of the United States and resulted in the collection by the department and the transmission to Europe of the remainder of a decedent's estate. In another instance it seemed necessary for my department to take up and adjust a dispute between an attorney and his client. I have however, so far as seemed to be proper, endeavored to relieve the department of matters of this nature, and to put them in the hands of attorneys, where under our system they seem properly to belong. In this connection it may be well to refer also to the fact that the principle in the written constitution of the Spanish monarchy that personal liability may be incurred by a magistrate who errs in the discharge of his judicial duties, has been the occasion of appeals almost without number to this department. It is to the credit, however, of the reorganized judicial system of Porto Rico, that such communications are now less numerous, and that a reference to the proper judicial officer usually results in a rational and satisfactory explanation.

The Attorney-General is required by law to take charge also of the prosecution of subordinate judicial and other insular employees for official malfeasance. This duty becomes an extensive one by reason of the provision contained in Section 16 of General Orders, No. 98 of 1899, which gives to any resident of the island the right to file with this department an information against any magistrate, judge or judicial officer, for misconduct in office or for immorality in private life unbecoming his official position. There have been during the past year a number of complaints of this kind, each one of which has had careful investigation. In several instances where the complaints have

been verified, the resignation of the officials involved resulted when requested by the department. In other cases such charges were carried into the courts, where either acquittal or conviction was obtained according to what seemed to be the weight of the evidence. I regret in this connection to have to report that I have been compelled before the Supreme Court to prefer charges of a grave nature affecting the official and personal honor of one of the prosecuting attorneys of the island. The case is now pending.

The Board of Prison Control was formally attached to the Department of Justice under the terms of an order issued by the military authorities. This board however was abolished by an act of the legislative assembly, and the office of director of prisons was created. By administrative order this officer and all the prisons of the island were placed under the administrative supervision of the Attorney-General. This duty is from its nature an important one, and an effort is now being made by the department to examine thoroughly into the conditions which prevail in the penal institutions with a view to their improvement.

In this connection the investigation of applications for pardon and a report thereon to the Governor of the island, is one of the duties of this office. During the past year nearly six hundred applications of this nature have been examined and reported upon.

Besides the duties above enumerated the department during the past year has had charge of the initiation of trial by jury in criminal cases, to which further reference will be made in these pages.

Under the rules of the executive council the Attorney-General, besides being a member of the committee on municipal and private corporations, is the chairman of the committee on judiciary, the committee on harbors, ports and mines, and of the committee on franchises, privileges and concessions. The work of the latter committee is in itself equivalent to a separate bureau. All franchises after being considered by the committee and acted upon by the Council are drafted by the Attorney-General.

JUDICIAL SYSTEM.

In a report rendered by me to the Honorable Charles H. Allen, lately Governor of Porto Rico, on the first day of April

last, which was incorporated by him in a report submitted to the President on the first of May and published at the government printing office, I had the honor in brief outline to set forth the jurisdiction of the several courts of the island, including the police, municipal and district courts, and concluding with a reference to the Supreme Court which is the highest judicial tribunal in the island. I will not burden you with a repetition of what was there said on these matters. It will be sufficient to say that the entire judicial system of the island was reorganized by the military authorities while the government of the United States was in the military possession of the island. How well this work was done is evidenced by the fact that the jurisdiction then conferred upon the several courts, has been retained by the legislative assembly with one minor exception. The judicial capacity vested by military authority in the alcaldes or mayors of the various municipalities in respect of petty infractions of police regulations and municipal ordinances, was transferred by the legislative assembly to the police courts then created by it; but otherwise no substantial change in the courts or in their jurisdiction has taken place.

I attach hereto certain schedules showing the activities of the several courts of the island during the past year, from which it will be observed that criminal cases far exceed in number those of a civil nature. It is but proper however to say, that a partial explanation of this is found in the fact that the law of torts is a practically undeveloped branch of civil remedial procedure; there is scanty recognition in the civil code of the principle that the commission of a tort creates an obligation to make recompense to the injured person. The practical result of this is that redress for torts which in the United States is pursued in an action for damages, is usually here pursued by means of a criminal proceeding. In the penal code mere torts are classified among crimes, and in addition to the criminal punishment involved, provision is made not only for fixing the damages to be paid to the aggrieved person, but for the collection of such damages. In a case of murder the sentence of the prisoner to death or to long imprisonment usually involves also a judgment against him for pecuniary damages suffered by the family of the deceased. In almost

every criminal sentence will be found an assessment of damages. The practical result of this is that persons guilty of some tort, which in the United States would occasion an action for damages, are here often prosecuted under the penal code, not only to secure their punishment but in order to recover damages for the injury. The practical inconvenience of the system is that a personal wrong is thus redressed and a judgment for damages secured through the efforts of the public prosecutor at the public expense without cost to the person aggrieved. For this reason complaints which with us take the form of actions for libel, slander, assault, etc., for the recovery of damages, are here usually prosecuted criminally.

But all of these matters are in the minds of both the bench and bar of Porto Rico. They are also under consideration by a special code commission, and I doubt not that at the coming meeting of the legislative assembly new legislation will be enacted, in an effort not only to correct some of these defects, but to bring the entire body of law more into harmony with our American system of jurisprudence.

THE PENAL CODE.

The penal code established by the Kingdom of Spain in its provinces, and still in force in this island, has been described by a close student of Spanish law as "one of the most ingenious instruments ever devised for reducing judicial discretion in the administration of justice to a minimum." Certain it is that in the assessment of punishment against offenders of the law, much of the freedom of action that characterizes the administration of the criminal law in the United States is withdrawn from the courts. For this discretion there is substituted an elaborate and scientific schedule of punishments, which permits very little latitude to the court in dealing with convicted criminals.

The framework of the system contemplates five grades of criminal responsibility :

1. For the completed crime.
2. For the frustrated crime.
3. For the attempt to commit the crime.
4. For the conspiracy to commit the crime.
5. For the proposal to commit the crime.

There are fourteen grounds of exemption from criminal liability and eight classes of circumstances which extenuate it. In addition to this complexity, there are twenty-six classes of facts, which when attending the commission of crime, increase the penalty imposed. And with respect to these grades of responsibility, the accused may be guilty, as at common law, either as principal, accomplice or accessory. For each offense, and for each combination of facts surrounding the commission of it, penalties are imposed upon a carefully graduated scale. For instance in a pardon case now before me the sentence for the crime of assassination was twelve years and one day. In a case of passing counterfeit money the term of the sentence was for ten years five months and twenty days. In a case of murder it was for fourteen years, eight months and twenty-one days. In nearly all sentences a fraction of a month is necessary to be added in order to comply with the schedule of punishment elaborately set forth in the code.

The punishments are further classified as corporal, correctional or light. Of the former there are sixteen varieties running from death through imprisonment for life to imprisonment for years at hard labor with or without chains. Of correctional punishment there are seven kinds, the most severe being imprisonment in the penitentiary from six months to six years and one day.

There are accessory penalties, fractional penalties and composite penalties. And there are maximum, medium and minimum degrees in assessing penalties. Summarized there are nine scales and sixty degrees of penalties. So varied and so multiplied are the combinations of penalties that may be imposed, and so carefully are they set forth in the penalty tables, that the fixing of the punishment for a crime of which a prisoner is convicted is almost as mechanical as working out a result from a table of logarithms. So exact and refined is the system, that, in the adjustment of punishment, facts enter that are wholly disregarded in the punishment of criminals in the United States, except for their general moral effect on judge and jury. For instance, if a highwayman, in effecting a robbery on the highway, uses more violence or intimidation than is necessary for the accomplishment of his purpose, this fact is taken into account and the punishment adjusted accordingly.

The penal code is the product of much thought and experience and it does not become me, therefore, to enter upon a criticism of it. It is thought by Porto Rican and Spanish lawyers who have practiced under it to rank next in excellence to the Spanish mortgage law. It is I think plain, however, that in the endeavor to provide for every circumstance which may lessen or enhance the criminality of the act, the real difference between things which are wrong in themselves, because they shock the moral sense, and things which are prohibited on grounds of public policy, is to some extent lost sight of, and the ethical influence of the code lessened. For instance in a case of assault, the test of jurisdiction between the municipal and the district court, is not the malice or the intent of the person committing the injury, but the length of time taken in the healing of the wound. If, for instance, a citizen is assaulted with a deadly weapon attended by every element of passion and malice, and is wounded so lightly that the cure of the wound takes place in eight days or less, the offense is no more than a mere misdemeanor and is cognizable only in the municipal court; if in another case the cure takes longer, the gravity of the offense, even though there was no passion or malice, becomes greater, and the case is taken to the district court. An effort to bribe an officer when made by a relative is distinguished in the law from an effort to bribe when made by one not related to the official. In the latter case the punishment is severe, but in the former case the punishment is only a fine equal in amount to the amount of the bribe offered. Crimes against womankind may be punished by the state only upon the demand of the parents of the victim, and when the offense is condoned by them the criminal responsibility is removed; in fact the courts cannot proceed to punish after such a condonation has been established.

I shall not burden this report with further observations as to the practical working of our criminal law. I have however been impressed with the fact that crime is punished with reasonable promptness and certainty and with no undue severity. The whole subject matter of criminality and the laws for its suppression and punishment are now being exhaustively studied by the code commission with a view to submitting an amended code to the legislature at its next meeting.

TRIAL BY JURY IN PORTO RICO.

Although the jury system in criminal cases has been in force in Spain for thirty years or more, the right of a trial by jury was never granted to the province of Porto Rico.

The first act passed by the first legislative assembly that ever sat in this island to represent its people, was an act establishing the right of trial by jury in any criminal case involving capital punishment or confinement for two years or more in a penal institution.

It is not peremptory, but the act confers that privilege upon the accused; he may elect at any time within two days before the case is set for trial whether he shall be tried by a jury or by the court.

The act was approved on January 12, of this year, and according to its provisions became effective on the first day of April last. Subsequently the same legislature passed an elaborate jury procedure act, which was approved on the 31st of January, and took effect likewise on the first day of April. Up to the date of this report however there has been no trial by jury in a criminal case in the history of the island so far as I am advised. Although the law has been in force now for nearly seven months, there have been but ten demands for trial by jury. This is doubtless due to several causes. In the first place there is a natural disinclination on the part of the judges and of the lawyers to enter upon a system so radically new. In the second place the unavoidable delay in the publication in Spanish of the session laws, resulted in keeping the people unadvised as to the jury law for sometime. Finally, through some inadvertence the legislative assembly omitted to make any appropriation for the payment of fees to jurors. Under all these circumstances it was not deemed wise to urge jury trials upon the bar or the courts. Now, however, as the next session of the legislature is approaching, and a deficiency appropriation may be had, I have deemed it wise to urge an apparently reluctant bar and bench to make a serious trial of the system. There will shortly be held in the capital under the direction of this department a conference of the presiding judges of the district courts of the island, at which a careful explanation and study of the jury procedure act will be made. Within a few weeks therefore it is hoped that the law will be in full operation.

Varying opinions have been expressed as to the outcome of the experiment. Some of the wisest lawyers and most experienced judges are looking forward with some apprehension to the result. It has been said to me by prominent citizens of the island that the people are not yet educated enough in the practice of self-government to understand and appreciate the dignity of participating in this way in the administration of justice. It has even been said to me that there is among some of the people a lack of appreciation of the sanctity of an oath, and that some jurors will not be bound by an oath. But although the records of this department demonstrate a low standard of veracity in some quarters in connection with criminal cases, I am strongly of the opinion that a people who have enjoyed for so many generations the education and refinement that characterize this community, will respond well to this new duty.

PENAL INSTITUTIONS OF THE ISLAND.

In the presidio or insular penitentiary situated at the capital are 591 inmates. Of these 180 are under sentence for various forms of homicide; 20 for assault; 258 for robbery, either in its simple form or in combination with other offenses; 56 for larceny, fraud or embezzlement; 9 for counterfeiting or forgery; 17 for arson or attempted arson; 7 for rape or attempted rape; 25 for "atentados," a term which comprises resistance to officers of the law; and 19 for miscellaneous offenses.

In the San Juan jail are 113 prisoners under sentence; 84 in the Ponce jail; 38 in that of Mayaguez, and 40 in the jail at Humacao. In the very small jail of the Arecibo district are 6 prisoners awaiting trial. In Humacao, there are 14 and in Mayaguez 14 such prisoners. In Ponce and San Juan are 169 prisoners in the aggregate, charged with offenses for which they have not been tried.

It is a rather notable fact that of the 1010 prisoners convicted or awaiting trial throughout the island there are but 9 women.

There are no institutions in the island for the separate confinement of juvenile offenders; nor has any provision been made for the separate confinement of insane criminals.

Since the American occupation industries have been estab-

lished for the prisoners in the insular penitentiary. There are now in operation shops for shoe-making, tailoring, cabinet-making and for blacksmith work; factories for the manufacture of hats, baskets and tobacco in various forms; a photograph gallery and a bakery. The products of these industries are almost entirely utilized in the maintenance of penal institutions. Good work is being done in these shops and factories, which are in reality schools where the inmates are taught trades. A school for elementary instruction in reading, writing and arithmetic is also maintained within the penitentiary walls.

Besides the insular penitentiary there are five district jails. The penitentiary was constructed about 50 years ago, and has no modern sanitary fittings. It is too small for the number of its inmates and has no space or park around it where proper exercise may be had. There are no separate cells for the prisoners, who are kept at night in one large dormitory; but the results seem to indicate that in this climate this system is more conducive to health than separate cells. The five district jails are inadequate for present purposes and that of the Ponce district is in a scarcely habitable condition. The efforts of an intelligent director of prisons have done much, however, to mitigate these conditions; and, as the financial resources of the island increase, improvements will doubtless be entered upon on a large scale, so as to bring the prisons of the island into a condition consistent with modern thought in such matters.

THE UNITED STATES DISTRICT COURT.

It is my duty to bring to your official attention the fact that, by the Organic Act of Porto Rico, the salary list and expenses of the United States District Court are made a charge upon the insular treasury.

This tribunal in that act was assimilated in its functions and jurisdiction to the other District Courts of the United States. It is in every sense a federal rather than an insular institution. On the criminal side its activities are limited to the punishment of offenses against the laws of the United States. Much of its time is taken up in the trial of smuggling and counterfeiting cases; violations of the postal laws and crimes committed in the military reservations of the United States. In other words the United States is now punishing those that offend

its own laws in this island at the expense of the insular treasury.

On the civil side, as I am informed, there are very few cases involving the constitution, laws or treaties of the United States between citizens of Porto Rico. Diversity of citizenship on the contrary is the usual ground of jurisdiction. In other words citizens of the states and territories of the United States are having their rights adjusted here in the federal court but at the expense of the people of Porto Rico.

Under these circumstances there would seem to be no stronger reason for charging upon this government the budget of that court and of the United States District Attorney, and the United States Commissioner than there would be in charging the disbursements of the United States courts and officials in Illinois upon the treasury of that state.

I respectfully urge this matter upon your attention in the hope that the propriety of recommending to the Congress that these expenses be borne in the future by the federal government, and that the insular government be reimbursed for its disbursements in the past, may have your consideration.

ADMINISTRATION OF LAW AND LAW REVISION.

I cannot bring this report to a close without expressing to you the opinion that the conditions actually existing well warrant a hopeful outlook in the administration of justice in this island. The courts are performing their duties with a fair degree of satisfaction to litigants and to the public at large. Property rights are respected and protected by them. Offenses against vested interests and against personal security are promptly punished. There is doubtless room for improvement both in the law itself and in the administration of the law ; but the reform in both respects has already begun. Pioneer work in the way of improvement was done by the United States military governors ; additional reforms are doubtless necessary. But in my judgment they may well be left to the insular legislature and to the code commission created by it, and now in the midst of its labors, preparatory to presenting the results to the legislature at its approaching session.

The work of revision will doubtless be conducted, as it should

be, with conservatism and without sudden or radical changes. The body politic of Porto Rico is one under which Spanish civilization has predominated for four centuries; and it must not be forgotten that that civilization is not devoid of a jurisprudence of high character adapted, to some extent at least, to the needs of the people of this, its former province. Much in the jurisprudence of Porto Rico in force to-day is too useful and too thoroughly imbedded in the daily life of the people to be discarded. Reform and revision in my judgment should start therefore from what is old and should proceed by the elimination of that which has ceased to be useful or is manifestly out of harmony with our American institutions. The community is supporting organized government in all of its phases under laws with which they are thoroughly familiar. A high degree of intellectual and commercial activity is beginning to respond to the new conditions and to the new opportunities that have been opened to them. A manifest prosperity and a resulting condition of contentment, peace and order seem to have come to us. All this is taking place under a system of laws of Spanish origin. To interrupt this advancement by any abrupt substitution of a new system or any seriously radical amendment of the old system would be a harsh and unnecessary change. The development of the community will proceed best under the laws with which the social and business life of the island is familiar.

At the same time the necessity of bringing the institutions of this island into closer harmony with our own institutions may be pursued with less difficulty than has been imagined. The intervention of a jury in a criminal case, for the decision of questions of fact under laws that clearly throw the burden of proof upon the state and give to the defendant the benefit of reasonable doubts, require no violent change in the present law. In many other respects the principles of personal liberty which distinguish the Anglo-Saxon jurisprudence may be easily engrafted upon this system, without detriment to the general body of our laws.

The organic act which serves as our constitution seems in a notable degree to be adapted for all the exigencies of government which have arisen during the past year. While it is sufficiently rigid in respect to the great essential principles of a

free government, it is sufficiently elastic in the details of administration, to make it readily adaptable to a jurisprudence of another origin. It is a successful piece of legislation, which in my judgment needs no essential modification.

I have the honor, Sir, to be,

Your obedient servant,

JAMES S. HARLAN,

Attorney-General of Porto Rico.

To the ATTORNEY-GENERAL OF THE UNITED STATES.

ANNUAL REPORT
TO THE
GOVERNOR OF PORTO RICO
JUNE 1, 1901 TO MAY 30, 1902.

OFFICE OF THE ATTORNEY-GENERAL OF PORTO RICO,
August 1, 1902.

SIR: In my first report to Governor Allen and in a report made in November last to the Attorney-General of the United States, I set forth in some detail the duties of the Attorney-General of Porto Rico and of his department, and made a general statement in narrative form of the jurisdiction of the several courts of the island. Those reports contain much information that might otherwise properly be made a part of this report. But in view of them it will not be necessary to go over that ground again.

THE NEW CRIMINAL CODE AND PROCEDURE.

Since the above reports were prepared a new penal code and a new code of criminal procedure have been adopted by the legislative assembly. They went into effect on July 1, and have therefore been in operation for a period of one month only. Moreover, as crimes committed before noon on July 1, must be investigated and the accused persons tried and punished in accordance with the old code, there has not been an adequate opportunity for testing the sufficiency of the new laws.

The new codes were prepared by a code commission appointed by the Governor of Porto Rico under the authority of an act of the legislative assembly. They are essentially American in form and substance, having been taken, as is generally understood, almost word for word, with such changes as were nec-

essary to adapt them to our system, from the penal code and code of procedure of the State of California.

In their general structure all criminal codes must of necessity be substantially alike. They must define crimes and offenses and establish penalties to be suffered by those guilty of them. The Spanish criminal code however established penalties in such minute detail as to require special study on the part of judges in order to enable them to be applied. Aggravating and extenuating circumstances in connection with the commission of the crime or offense were required to be taken into consideration and the penalty adjusted accordingly with mathematical precision. The age, condition in life or other circumstances personal to the accused could not be considered. The new code places in the judges a wide discretion in the assessment of penalties, so that all the circumstances in relation to the crime or to the prisoner may be taken into account and considered by the court in determining the penalty or fine to be imposed.

In other respects the new code involves some radical changes. Crimes like embezzlement, seduction and rape under the Spanish code were considered more as crimes against the person injured than as crimes against the public. The prosecution of such offenses was substantially in the control of the persons wronged, and the offenses might be condoned by them and the prosecution terminated without regard to the public welfare and without the consent either of the prosecuting attorney or of the court. The result was that in some cases, happily few in number, of the violation of females accompanied by shocking brutality the parents, presumably for a pecuniary consideration, condoned the offense and pardoned the offender, leaving the public prosecutor and the court powerless to proceed and the public conscience outraged and justly indignant.

The crime of perjury was practically not punishable at all. On one occasion what under any American system of jurisprudence would be called perjury, when admitted in open court by the judicial officer guilty of it, was found not to be punishable under the law, and the only way in which he could be punished was by dismissal from the public service. In an application for a respite addressed to you on behalf of a prisoner sentenced in the federal court to a term of three years for perjury the

false declaration under oath is practically admitted, and the statement is made in substance that the prisoner did not know that he was committing a crime. The new code provides a substantial punishment for perjury and puts the other crimes mentioned on their proper basis as public offenses in the control of the public prosecutors.

The Spanish penal code and the code of criminal procedure formed a carefully devised system of criminal law and had many commendable features. They constituted however a system which on its face was imposed by paramount power, and not such a system as would be enacted by a free people. It was based apparently on the theory that the judges could not be fully trusted without supervision to perform their duties conscientiously; that each judge should serve as a check or guard upon the others; and that the acts of all should be subject to scrutiny by the ministerial official charged with that duty. The form in which the courts were required to express their findings of facts and opinions on questions of law were all carefully prescribed by law, thus withdrawing from the judiciary that freedom of expression in judicial announcements which in other countries has afforded opportunity for professional reputation. Some of these features of procedure are not altogether eliminated by the new code of procedure; but the new laws proceed on the theory that judges, above all other public servants, may be trusted to perform their public duties conscientiously and with a full appreciation of the dignity and importance of their functions. I am glad to say, and in this I think candid observers will concur, that the bench of Porto Rico has made satisfactory progress and is rapidly separating itself from those traditions of the past that were not consistent with judicial office, and is reaching a position creditable to itself and to the people of Porto Rico. It is believed that the new codes, when time and experience shall have afforded opportunity to correct their deficiencies, will be better adapted to the form of government now existing in the island.

Under the new code of criminal procedure no grand jury is required; criminal proceedings are based upon an information filed by the fiscal or prosecuting attorney. In this respect the new system is in substance similar to the old Spanish system. Justices of the peace are established as examining and commit-

ting magistrates ; upon the affidavit of the person offended they may issue warrants for the arrest of the accused ; they may hold a preliminary examination, and if the evidence tends to show the commission of an offense, they may bind the accused over for trial. They may require and admit to bail substantially in accordance with the practice that exists in all of the states of the United States. The change from the prior law which seems more likely to bring about immediate beneficent results is in this matter of requiring bail of persons accused. The general orders of the military government, admirable in most respects, left the matter of bail in some confusion. This is corrected by the new code. Under the law as it formerly existed, unless the crime committed involved a punishment of six years or more the accused was entitled to his liberty without bail until tried and convicted. The result was that when convicted by the trial court an appeal to the supreme court was taken by the prisoner as a matter of course, simply in order that the imprisonment might be further delayed, without costs, bail or other inconvenience.

It is not to be expected that the new codes can or will be put into operation without the development of the necessity of some amendments and alterations, in order that they may be more thoroughly adapted for our use in Porto Rico ; nor could it reasonably have been hoped, in view of the fact that the procedure was almost entirely new and more especially in view of the fact that the law was published and made available in printed form only about ten days before it went into effect, that the prosecuting attorneys and judicial officers could put it in operation without making mistakes. I am glad to say however that up to this date no serious error or difficulty has appeared. This result is largely due to the great zeal and commendable promptness with which the members of the several courts, as well as the fiscals and lawyers of the island, have applied themselves to the study of the new codes.

THE JURY SYSTEM.

The first statute enacted by the legislative assembly of Porto Rico at its first session established the right of the accused to demand a trial by jury in cases involving a punishment for a period of two years or more. A short time afterwards, during

the same session, a jury-procedure act was passed and a sufficient appropriation made for putting it into effect on April 1, 1901. Although a change in the criminal law so radical as this attracted much attention and was the subject of much comment by the press of the island, it was some months before any defendant accused of crime availed himself of the right to have a jury of his peers pass upon the question of his guilt. And although the act has been in operation for nearly a year and a half, there has been no demand for such a trial by any defendant charged with crime in the district court of San Juan, the most important trial court of the island. In the other four trial courts there have been in the aggregate but twenty-four jury trials to this date. I do not feel, therefore, that the law has been sufficiently tested to enable me to form any judgment as to whether the enactment was premature and as to whether the right to demand a jury trial will be an efficient aid in the administration of the criminal laws. My belief and hope is that the people, being thus called upon to participate in enforcing their own laws, will respond intelligently and will perform their duty with reasonable satisfaction.

It is to be said for the system of submitting the issues in a criminal case to three trained jurists, heretofore and now prevailing when the person accused does not demand a trial by jury, that a judgment of guilty is almost certain to be in accordance with the facts. I have been impressed with this from the examination of the applications to you for pardon which have been submitted to me for investigation and report. It is very seldom that such an application fails to contain in some form an admission of guilt by the petitioner, and when the claim of innocence is made a study of the case rarely fails to reveal the fact that it is of a frivolous nature and without foundation. Guilty men may occasionally escape just punishment in Porto Rico, but I have been compelled to the conclusion that the punishment of innocent men by a court of three judges has rarely happened since the establishment of civil government in the island.

FRAUD UPON THE REVENUES.

Although the statutes provide for fine or imprisonment or both, at the discretion of the court, in the cases of persons ac-

cused of defrauding the internal revenues or the customs of the island, I have found it difficult, even in clear cases, to secure in the courts anything more than the imposition of a fine. It has been said in explanation that under the Spanish government of the island the defrauding of the Spanish treasury of the revenues established by law was not generally considered a serious offense. I have not been able to investigate and learn whether this was the fact or not ; but I have been pained to observe, since I assumed charge of this department, that a fine only, and frequently the smallest fine permissible under the law, has been imposed by the courts, even in cases where the crime was absolutely free from extenuating circumstances. In several cases where men of prominent position, socially and financially, have, with deliberation and careful planning, succeeded in working a fraud upon the insular treasury, fines only have been imposed. I have made this matter a subject of conference with the fiscals, and am glad to report that there has developed recently in all of the courts a determination, by imposing reasonable penalties of imprisonment, to coöperate with the government in its effort to wholly suppress such fraudulent enterprises. It is said by way of explanation that during the time of Spain insular revenues were taken from the island and used to some extent for national purposes, and that therefore an evasion of payment simply reduced the amount of the national tribute. However this may have been, the government of the United States not only bears all expenditures for national purposes in the island of Porto Rico, but, by the establishment of a provisional regiment of infantry composed entirely of natives of Porto Rico and by the purchase of supplies and by disbursing funds for labor done, pays out monthly in the island a large sum of money nearly every dollar of which remains in the island. Moreover every cent of insular revenues is expended for insular purposes. And the citizen who undertakes to defraud the insular treasury defrauds every man and woman and child of the island whose money it is. When this fact is fully appreciated, it is not difficult to see that the more intelligent and the more prominent the citizen who is guilty of the fraud the greater is his crime and the more severely should he be punished.

It has been said that the judicial system of Porto Rico is an

expensive establishment. In round numbers the island has a population of about 1,000,000 people. The assessed valuation of the real estate is about \$125,000,000. In the enforcement of the criminal laws and in the protection of the life, liberty and property of the people of the island, there has been established a judicial system consisting of the following officials:

1. There are forty-eight justices of the peace. They have jurisdiction over offenses against municipal and police regulations and of minor misdemeanors. They enjoy a salary of \$50 a month, except the four justices in the municipalities of Ponce and San Juan, whose salaries are fixed at \$100 a month. The total annual budget for these judges is \$31,200, and is a charge upon the respective municipalities.

2. There are five district courts in the island having general cognizance of civil and criminal matters. Each court has three judges and a fiscal or prosecuting attorney. In the district court of San Juan these officials receive a salary of \$3,000 each. In the other four district courts the salaries are fixed at \$2,400 each. The total annual appropriation for salaries in the district courts is \$50,400. The fiscal of the supreme court receives a salary of \$3,000, and the chief justice \$5,000. The four associate justices are entitled to a salary of \$4,500 each. Total, \$26,000.

3. In civil matters involving \$400 or less, the municipal judges of the island have jurisdiction, but they are paid by a system of fees. Excluding therefore the salaries of secretaries and clerks of the courts, which are all adjusted on a moderate and reasonable basis, the total appropriation for judicial salaries is \$107,600.

As a basis of comparison your attention is invited to the appropriations of Cook County, Illinois, for the support of the judicial branch of its government. With a population and an assessed real estate valuation about double that of the island of Porto Rico, it has 132 justices of the peace, together with forty-one county magistrates. Including six judges in the appellate court and seven judges sitting in the supreme court of the state, there are thirty-four judges of general jurisdiction engaged in the administration of the law in that county at a salary of \$10,000 a year each, and of these, twenty-seven judges have masters in chancery to assist them in the performance

of their judicial labors. The masters are paid by the litigants appearing before them. Their annual fees often exceed the salaries of the judges. During the past fiscal year the cost of the judicial establishment of that county, including the salaries of the jury commissioners and the sheriff, amounted to almost \$1,000,000. I have not the figures at hand to show just what part of this amount was paid as salaries to the clerks and employees of the courts. The comparison cannot, therefore, be proceeded with in exactness, but I do not hesitate to say that the insular judicial establishment is proportionately the less expensive. It is true that under the fee system prevailing in Illinois the courts received during the same fiscal year an aggregate of almost half a million dollars, leaving the total expenditure out of the treasury for the judicial branch of the government, \$500,000 in round numbers. But if a similar fee system was adopted in the island its receipts, I am sure, would still further advance the insular system in the comparison of general results.

I do not think therefore that the statement that our judicial establishment is too expensive is altogether a just one. Undoubtedly if the system of a court of three judges should be abandoned and in its place there should be established trial courts presided over by one judge as is generally the case in the United States, the budget would be to some extent reduced. But the result would not be appreciable, for the business of the several courts would require the same staff of clerks, and all that would be saved would be the salary of, say, one judge in each district. While ultimately trial courts of one judge may be found to be more practicable in civil and in criminal cases, I am of the opinion that for the present such a change is not desirable. Until the jury system is more firmly established and in more general operation a court of three judges is desirable, at least in criminal cases. The taking of the liberty of accused persons, and sometimes of their lives, cannot safely be entrusted, when a jury is not demanded, to a trial court consisting of one judge. The responsibility is too great to impose upon any man however learned he may be and however desirous of doing justice. For the present therefore I am strongly of the opinion that no change should be made in the constitution of the several district courts. It would be well

however at the coming session of the legislature that some provision be recommended by you permitting two members of the court to appoint a substitute judge, so that civil business may be proceeded with while one judge is conducting jury trials in criminal cases. A small additional appropriation for a substitute judge for each district court will enable them to avoid the delay in the transaction of civil business during the holding of jury trials.

Climatic conditions make it desirable that each judge of the district court shall be entitled by law to a vacation on full salary of at least six weeks during each year. Under the present law they are entitled to a vacation of forty-five days on half salary. In this respect the judges of our courts do not fare so well as the employees in the several departments. A small additional appropriation for substitute judges at half salary will suffice to do full justice in this respect, and I recommend that such a suggestion be made to the legislature at its approaching session.

NEW LEGISLATION REQUIRED.

In the time of Spain there existed in the island a court known as the tribunal del contencioso administrativo. It furnished a means by which citizens might seek judicial redress against decisions rendered by administrative officers in which their rights were involved. It was in some measure a court of claims, in which rights asserted against the government, after being passed upon by administrative officers, might be considered judicially. This jurisdiction is now being exercised by the district court of San Juan, and owing to the number and importance of such cases, it is some months behind on its general civil and criminal docket. Its authority in law for the exercise of this jurisdiction is extremely doubtful, but as it is manifest that such jurisdiction should be lodged somewhere, in order that citizens may have their rights against the government judicially considered, I have not thought it wise to make a test of the question by raising the point on the pleadings. It is obvious however that the matter should be the subject of legislation, in order that such jurisdiction may be put upon a definite and well-considered basis, and it is my purpose to pre-

pare and present for the consideration of the legislative assembly a draft of a bill for that purpose.

It is also highly desirable that the whole matter of the jurisdiction of the several courts of the island should be readjusted in one judiciary act. The Spanish legislation relating to the subject was materially modified by the general orders of the military government. Since the establishment of the civil government a number of acts have been passed in which, in one way or another, the jurisdiction of the several courts is involved. There is a lack of harmony and coördination in these various enactments, and it would be a material advantage to have one act prepared covering the whole subject-matter. I do not think that such an act should substantially modify the law as it now exists but should be confined simply to an effort to codify it. I am of the opinion however that the jurisdiction of the supreme court should be enlarged. As a court of cassation its powers are much limited. In my judgment it should be established as a court of appeals where the records may be examined into and judgments amended, modified or reversed according to the weight of the evidence and the merits of the case as it appears in the record. In a criminal case recently appealed to that court it was compelled, under its limited jurisdiction, to accept the findings of fact by the trial court and to affirm the judgment, although it conclusively appeared upon the papers that the defendant, though guilty of one crime, had been convicted for another crime which he had not committed. The result was that I was compelled, upon the suggestion of the court, the error having also been discovered in my office, to recommend the case to you for pardon. If it had been a court of appeals, with power to examine into the evidence, this plain error of fact by the trial court would have been sufficient ground for a reversal of the judgment by the supreme court.

PENAL INSTITUTIONS AND PARDONS.

During the past fiscal year I have personally examined the penitentiary and the Ponce jail. The other penal institutions of the island have also been examined and reports made to me. I find that they are kept in the best sanitary conditions possible under the circumstances, and the health reports are reason-

ably satisfactory. The jail in the municipality of Ponce is wholly unfit for penal purposes and has been condemned by the federal grand jury. As a result of a personal inspection of it I deemed it my duty to recommend its abandonment to you, and that sufficient funds be placed at my disposal for erecting a new jail for that district. The transfer by you for this purpose of the sum of \$8,000 out of available funds will enable me early in the fall to commence the erection of a new building on the outskirts of the city of Ponce upon land supplied for that purpose by the municipality. Climatic conditions are such as probably to make that sum sufficient for the erection of a suitable building commodious enough for the housing of the average number of prisoners that may be sentenced to detention there during the next ten years.

The director of prisons is making commendable efforts to teach some trade to each prisoner before he leaves the penitentiary. The results are not altogether satisfactory but it is my hope to be able within the next few months to reorganize the system and put it on a better basis. With that general end in view and in order that each prisoner may also have the advantage of an opportunity to learn to read and write, I have asked the coöperation of the Commissioner of Education in the establishment of proper schools in each penal institution.

From June 1, 1901, to June 1, 1902, 316 applications for pardon have been examined in my office. Of this number reports were made to you in 303 cases; in 239 cases the applications were denied by you; in 34 cases you granted full pardons; in 25 cases, upon my recommendation, no action at all was taken by you; and in 5 cases commutations were granted and the penalties imposed reduced. In 13 cases the terms of imprisonment were completed before proper investigations could be made. In addition to these 316 petitions quite a number were addressed to you by prisoners whose previous applications had been considered within six months preceding the date of their second application. Following the custom of the department not to consider applications when renewed within six months after a previous consideration, these cases have remained unacted upon.

THE SUPREME COURT OF PORTO RICO.

For your information I append hereto a statement of the business of the supreme court of the island during the past year.

I have the honor, sir, to be your obedient servant,

JAMES S. HARLAN,

Attorney-General of Porto Rico.

To the GOVERNOR.

ANNUAL REPORT
TO THE
ATTORNEY-GENERAL OF THE UNITED STATES

OCTOBER 1, 1901 TO SEPTEMBER 30, 1902.

OFFICE OF THE ATTORNEY-GENERAL OF PORTO RICO,
November 1, 1902.

SIR: In pursuance of the duty required of me by law, I have the honor to submit a general report for the year beginning October 1, 1901, and ending September 30, 1902.

NEW LEGISLATION.

One of the most important features of our insular history during the past year has been the radical changes and amendments in the body of our laws. Besides important statutes relating to specific phases of administration and government such as laws establishing an insular police, an insular board of health, an asylum for the indigent blind, and a system of industrial schools, statutes have been enacted and are now in operation providing for the consolidation of municipalities and for their government on a more modern municipal basis. The insular system of taxation has been corrected and perfected and a new board established for hearing appeals by property owners against the valuations made of their properties by the tax assessors. An amended general election law has been passed as well as an amended law for municipal elections. The laws in relation to public schools have been reformed and municipalities have been authorized to levy taxes for school purposes.

Serious measures were also adopted by the legislative assembly for bettering the police and sanitary condition of the island, such as the law regulating the carrying of concealed weapons; the law prohibiting gambling and the keeping of gambling houses and the operating of slot machines and other gambling devices; the law providing for the closing of commercial and

other establishments on Sunday ; and an act regulating the employment of minor children in manufacturing and agricultural pursuits and for their general protection. A much needed act intended to prevent and punish cruelty to animals has also been placed on the statute books.

In connection with matters of sanitation a law regulating the slaughter of cattle and the sale of meat has been enacted. A statute for the suppression of contagious diseases was also passed by the legislative assembly, vesting in the governor of the island and in the insular health authorities broad powers for the protection and preservation of the public health.

The commercial and property interests of the island have also had attention. The legislative assembly enacted a law for the incorporation of companies for lawful commercial and other purposes. It is a modification of the New Jersey incorporation act, and affords investors an opportunity to organize companies in the island on a plan that has been perfected in the light of judicial decisions and is more or less familiar to the American investing public. An act fixing a legal rate of interest and containing provisions against usury was also passed. Appeals from decisions of registrars of property may now be taken directly to the supreme court, thus affording a speedy and inexpensive method of removing defects and clouds from titles to real estate. At the same session of the legislature a civil action was established to recover damages for personal injuries resulting from negligence. Heretofore such damages might be recovered only as an incident to a criminal prosecution against the negligent person. The act is drawn upon conservative lines, and limits the damages in case of death to the sum of three thousand dollars and in case of injuries not resulting in death to two thousand dollars. It provides that no such action shall be maintained against an employer unless notice of the time, place and cause of injury shall have been given to him within thirty days after the accident occurred or unless it be commenced within six months. Under another statute the courts may now entertain a civil action to recover damages for slander and libel, and the jurisdiction thus conferred has been invoked upon several occasions since the law was passed.

The extraordinary remedy of injunction has also been incorporated into the Spanish civil procedure to supplement the less

satisfactory and less summary relief afforded by the *interdicto*. Threatened injuries to property rights may now be stayed and prevented in proper cases, with or without notice, substantially in accordance with the practice with which American lawyers are familiar. The first injunction writ issued in this island under the new law was at the suit of the insular government. Under another statute the insular government may by a *quo warranto* proceeding inquire into usurpations of rights and franchises by persons and corporations.

The courts have also been clothed with power to punish summarily for contempts committed in their presence. This statute takes the place of the inefficient provisions in the Spanish law by which such contempts were treated as crimes and punished in a criminal proceeding. The supreme court of the island was also given the power to make its own rules in relation to the hearing of appeals brought before it and in relation to the conduct of its affairs. It may also prescribe rules for the admission of lawyers to practice before the courts of the island. And a law has also been enacted regulating notarial practice.

In addition to the separate and special acts above alluded to, a political code codifying and amending the laws relating to the structure of government and its jurisdiction over persons and property and materially altering and enlarging the work and jurisdiction of the several departments of government was enacted. A new penal code and a code of criminal procedure, substituting a system of American origin for the Spanish penal code and code of procedure went into effect on July 1. A civil code involving extensive modifications and changes in the existing law was also passed.

All these laws and codes were the subject of consideration and final action by the legislative assembly at its last session. Taken together they embrace not less than one thousand pages of a volume recently published, entitled "Revised Statutes and Codes of Porto Rico." And this work of lawmaking was done in a session of the assembly beginning on January 1, 1902, and ending on March 1 of the same year.

It must not be inferred however that such results could have been accomplished or would have been attempted by the legislative assembly within so short a session without extensive

previous preparation. The several codes, for a period of nearly a year previous to the meeting of the assembly, had been the subject of the labors of a code commission of three members appointed by the governor under the authority of an act providing for such a commission and making an appropriation therefor. The report of the commission was presented to the legislative assembly in printed volumes in the form of bills ready for enactment. They were printed in both Spanish and English and when offered as bills were therefore ready for immediate consideration by a joint committee of the two houses of the assembly appointed for that purpose. The work of this body in amending the proposed laws was continued until the last week of the session and the codes as thus amended were then enacted, but not without some animated debates in the lower house.

It was evident also that the proposed new laws and policies necessary to complete the insular system had been under consideration by members of the lower house as well as by members of the executive council for sometime prior to the opening of the session. The result of this previous study of new measure and plans was to relieve the work of the committees to some extent and to expedite the enactment or rejection of the bills introduced.

That some errors should be found in the new laws was to be expected. But on the whole, and considering the time in which the bills were presented, considered in committee, debated on the floor, amended and finally enacted, they are reasonably free from defects. The errors that have developed are not of such nature as to impair the operation or efficiency of any enactment and they may without difficulty be corrected at the approaching session of the legislature, so that one harmonious system of laws will result.

THE POLITICAL CODE.

The purpose of this enactment was to codify and define the general powers of the several branches of government as those powers are delegated to them in the organic act, which serves as the insular constitution. The code proceeds upon a consistent plan, first defining jurisdiction over persons and property and then establishing citizenship and domicile. It then

divides the island into political and judicial divisions and the government into legislative, executive and judicial branches. The respective powers, duties, rights, privileges and obligations of the several branches of government are then taken up in systematic order.

The legislative branch in addition to its general power of making laws is now vested with the power of compelling the attendance of witnesses before it or its committees. And by a special act the privileges and immunities of members from arrest and from civil or criminal liability for words spoken on the floor of either house, together with the right of either house to punish contempts by fine or imprisonment, are established. Under the law as it now exists the legislative assembly is very similar in its general construction, powers and privileges to the legislature of a state or of an organized territory. Bills are introduced, considered in committee, reported upon and then considered in committee of the whole and finally passed, in much the same manner in which bills are passed by legislative bodies in the United States. It is interesting to observe that in their desire to establish the house of delegates as a purely American institution that body, composed with one exception of Porto Ricans, adopted the rules of the house of representatives as the law for its parliamentary procedure.

The political code as finally passed was supplemented by a special act introduced by a Porto Rican member entitled "An act to define the rights of the people." This bill, with slight amendments made in the executive council, was enacted into law and is in substance a bill of rights embodying all the essential features of liberty and free government as they are understood in Anglo-Saxon communities. Thus the whole structure of government, as well as the powers and duties delegated to the governor and heads of the various departments, and the powers and duties committed to the legislative and judicial branches of government, are now in many respects the same as in a state government.

THE NEW PENAL CODE AND CODE OF CRIMINAL PROCEDURE.

In a report to the Governor of Porto Rico dated on the first day of August last, and which is incorporated in his annual report to the President, I referred at length to some of the

defects of the Spanish penal system and to the essential points of difference between it and the new criminal code and procedure adopted at the last session of the legislative assembly. It will not be necessary therefore to restate what was there said. It is sufficient to say that the new penal system has now been in force for over four months and that the judges and lawyers of the island have encountered no substantial difficulty in its application. It is proper to say that the success which attended the putting of the new system into operation is largely the result of the zeal and industry of the Porto Rican lawyers and judges in acquiring an intimate knowledge of the new laws and of their cordial desire to make the new system successful.

There are however some cumbersome features in the new procedure which result in throwing increased and unnecessary burdens upon the judicial system. Persons charged before a justice of the peace with minor offenses are permitted under article 51 to waive trial in that court and to submit their cases to the district courts. In many of these cases it is probable that the defendants would be acquitted in the justice court; but desiring to postpone the possibility of conviction as long as possible they take advantage of this provision in the law to secure a delay until their cases are reached for trial in the upper courts. As a consequence the district courts are burdened with cases of small importance which ought to be determined in the inferior police courts.

Under article 72 of the procedure act the district attorney in presenting an information against an offender must certify under oath that it is based on the sworn testimony of witnesses examined before him. The greater number of cases come to the district courts after an examining trial by a justice of the peace. The latter official binds the prisoner over to the district court and the record that he sends to the upper court usually contains the sworn testimony adduced before him. This testimony is generally sufficient to justify an information or accusation by the district attorney, and as it is sworn to it would seem to answer every proper purpose as the basis of such action. But under the article in question the district attorney must nevertheless disregard the record and call the witnesses before him. Sometimes they have to come from long distances and the re-

sult is a hardship upon them as well as an unnecessary expense to the public treasury. In many cases the witnesses are first called before the justice of the peace, then called before the district attorney, and finally before the court when the cases come on for trial.

There are other defects of a minor nature but all may and doubtless will be corrected by the legislative assembly at its next session.

JURY TRIALS.

In my report to you of November 7, 1901, I called your attention to the fact that although the jury law had been in force for nearly seven months there had been no jury trials in any of the trial courts, and that but ten persons under indictment in the whole island had made a formal demand for such trials. And although during the year ending on September 30, 1902, the district courts of the island disposed of thirty-one hundred and eighty-three criminal matters of all kinds, in a large number of which the persons accused had the right under the law to demand a jury trial, but seventeen such trials were heard. In the district court of Arecibo no jury trial was held. In the district court of San Juan, the most important trial court of the island, there was but one. In that case the prisoner was charged with homicide and the jury having brought in a verdict of guilty, he was sentenced to fourteen years of imprisonment. During the same year there were eight such trials in the district court of Mayaguez. In four of these cases verdicts of guilty were found, and four of them resulted in acquittals. The district court at Ponce during the same period heard four jury trials. In two cases, one for homicide and one for criminal libel, verdicts of guilty were rendered. In the latter case after the twelve jurors had considered the evidence and found the defendant guilty, the court imposed a fine of only five dollars, a punishment quite disproportionate to the cost to the public treasury in bringing the offender to justice. In the district court of Humacao there were also four jury trials during that period. Of these only one resulted in establishing the guilt of the defendant. But lately there has been manifested in the jurisdiction of the district court of Mayaguez a growing desire on the part of persons charged with crime and on the part of

their attorneys to make use of the privilege thus accorded by law. This is indicated by the fact that in that court during the month of October following the period of one year covered by this report thirty jury cases were heard. This exceeds the entire number of such trials throughout the island in all the courts since the jury procedure act went into effect. Of the thirty trials only eleven resulted in convictions. And in the total number of forty-seven jury cases tried since the jury procedure act went into effect there have been but eighteen verdicts of guilty. The details as to the nature of the cases and the evidence adduced are wanting. But the percentage of acquittals is large and is suggestive as the possible explanation of the sudden popularity of the jury procedure act in that jurisdiction. But I see no just occasion for apprehension at this time. The number of trials is so small as, in my judgment, not to constitute a sufficient test of the efficacy of the jury system as an instrument of justice in this island.

REAL ESTATE TITLES.

The mortgage law of Spain, which is the basis of real estate titles in this island, is said by eminent lawyers of Porto Rico to be a monument of good legislation. It has long been in force here, is identified with the customs of the country, is in harmony with its civil legislation and seems to accomplish its purpose with admirable exactness.

Transactions affecting the title of real estate must be evidenced in the form of documents, not only acknowledged before a notary public but prepared by him, and subsequently preserved in his archives. The notary is, in fact, the only official authorized by law to intervene in real estate transactions. Documents prepared by him are called public documents, and such documents only are entitled to be recorded in the books of the recorder of real estate. The registrar of property, unlike the similar official in the United States, must be a person learned in the law. And unlike the system generally prevailing in the United States, the registrar is not obliged by law to record every document presented to him for that purpose. On the contrary he is allowed a period of fifteen days in which to examine it and to ascertain whether it has been drawn in accordance with the formalities of law and whether it conveys a

perfect title or is in conflict with a title claimed of record by some other person. If, after this examination has been made, the registrar of property finds the document in question to be in proper form and not in derogation of any other claim of record, he pronounces it entitled to record. The document is not recorded in full upon his books, but notes only are made of its contents, the original document being preserved by the notary, where it may be examined. Because of the special training in the law of real property which registrars must have before they can qualify themselves for holding office, it may fairly be stated as a general rule that the conclusions reached by them usually give assurance of a perfect title. In case the registrar finds some defect in the form of the instrument or some conflict in the title which it purports to convey with another title appearing of record, he will announce that it is not entitled to be recorded. But he must note his objections upon the instrument and return it to the owner. It is at this point that the system of real titles in force here seems to be very efficient and simple. For under the law enacted at the last session of the legislative assembly and referred to above, the holder of the document so rejected may appeal immediately from the registrar of property to the supreme court of the island without going through the inferior courts. The issue is made up by the statement of the registrar of the reasons for his action and by the statements of the vendor and the vendee and other persons in interest. Arguments and briefs may be submitted. If the court holds that the objections of the registrar are not well founded, he is directed to place the document upon record. If the court finds that the deed has some defect, a decision to that effect will be rendered and the defects pointed out. The document will then be recorded with the conclusions of the supreme court so that the respective parties may supply the deficiencies and amend the errors. If the deed is void a decision to that effect by the court disposes of it altogether. Hence, it appears that transactions in real estate in Porto Rico are on as reasonably safe a basis, so far as the mere record title is concerned, as in any of the states of the United States. The system may in many respects be compared with the so-called Torrens system as now in force in several of the states of the Union.

The fundamental difficulty lies in the fact that there seems to have been no general official survey of the island. The simplicity of conveyances in the western states of the United States, results from the fact that there is a public land office where, by reference to official maps and surveys on file, a particular piece of land may be accurately and easily located and its boundaries definitely established. Such a general system is wanting here but will doubtless be the subject of early legislation. The not infrequent result is a difficulty in the establishment of boundary lines. This is due to the lack of base lines established by official survey. It is made more confusing in some cases by reason of the fact that the standard of measurement to be found in the descriptions contained in deeds often varies. The older titles immediately following the royal concessions describe the lands conveyed in *caballerias*. The lands described in later deeds are measured in *cuerdas*, and sometimes by *hectares*; while the still more modern deeds refer to acres. In the cities and towns we find deeds to lots where the dimensions are expressed in *varas* or Spanish yards. In the next deed in the same title it may be expressed in *metres*. This difference in terminology has led to some confusion. But as a general rule it will be found when actually surveyed and worked out that a purchaser usually has more land than his deed calls for. This results from a tendency on the part of vendors, due to the inexactness of descriptions, to understate and thus avoid future liability rather than to overstate and thus become liable for errors. The first point therefore to insist upon in any important transaction in real estate is that the land shall be carefully surveyed before the transaction is completed.

As in the United States real estate may be mortgaged to secure the payment of credits. The proceeding to foreclose is very simple. But from the standpoint of the debtor the law is rather harsh in that there is no redemption. Upon the conclusion of the proceeding the title passes to the creditor. From the standpoint of the creditor it is, perhaps, as satisfactory as could well be asked for. With little loss of time, with costs and fees regulated by law on a moderate scale, a mortgage may be foreclosed without any equity of redemption.

American capital is coming to the island and already large investments in real estate have been made. On the whole, as

I understand it, American purchasers have no feeling of insecurity in respect to their titles, but on the contrary are increasing their investments.

INSULAR PENAL INSTITUTIONS—PARDONS.

In my report to you for the preceding year allusion was made to the unsatisfactory condition of the jail in the Ponce judicial district. Since that time an appropriation has been secured and plans are in preparation for a new building to be erected upon property donated for that purpose by the municipality of Ponce to the insular government.

Every effort has been made, and with reasonable success, to put the penitentiary in good sanitary condition. It is apparent however that it will not serve much longer as a place for the incarceration of convicts. It is my hope that the legislative assembly at its approaching session may take some action and that definite plans may be agreed upon in the near future for a new structure. From such personal examination of the penal institutions as I have been able to make, it appears that the officials in charge are reasonably zealous in keeping them in the best condition possible under the circumstances.

At my request the Commissioner of Education has agreed to undertake the direction, through his supervisors, of a school in the penitentiary, conducted upon simple but efficient methods, with a course of study of an elementary nature. Of the five hundred and eighty-two convicts confined there on September 30, 1902, three hundred and seventy-six were not able either to read or write.

Two hundred and eighty-five applications for pardon have been examined in this office during the past year and have been reported on to the governor. Upon recommendations made in these reports twenty-four pardons were granted. In three cases the sentences imposed were commuted to shorter terms. In twenty-four cases fines or terms of imprisonment imposed in justice courts were remitted or pardoned, and in thirty-six instances they were commuted to shorter terms or the fines diminished in amount.

During the year a question arose as to whether persons confined in the penal institutions of the island under sentences of the United States District Court for Porto Rico for infractions

of the laws of the United States were entitled to time credits for good behavior under the rules applied to prisoners convicted in the insular courts. Although section 5544 of the Revised Statutes of the United States relates in terms only to the jails and penitentiaries of the states of the United States, nevertheless the spirit of that section seemed to require me to hold that it must be taken as applicable also to the penal institutions of this island. And therefore federal prisoners are now receiving the benefit by way of time allowances for good behavior during confinement.

On the fourth day of June four prisoners suffered the death penalty by the *garrote*. On July 1, death by hanging was established to take the place of the apparently more humane and expeditious Spanish method. The reports made to me by officials present at Ponce on the occasion of the execution of the four men by the *garrote* show that in each case death was practically instantaneous and was not accompanied by appreciable pain. In my judgment the substitution of hanging is a step backward. But the new law which strips such occasions of ceremony and requires executions to take place within the walls of the prison instead of on a public plaza where the bodies as required by law remained exposed for some hours, is a great step in advance.

ADMISSION OF ATTORNEYS TO PRACTICE.

Under a general military order having the force of law until changed by the legislative assembly, the possession of a diploma issued by a law school in the United States was sufficient to entitle the holder to admission to practice in the various courts of the island. The possession of such a diploma issued by a Spanish university prior to the change of sovereignty was also sufficient. There seems however to be a marked inequality in the courses of study required by Spanish law schools and by some American schools. The former schools as I am informed as a rule grant a diploma only after a course of preparation extending over a number of years; while some American law schools are said to have granted diplomas after a period of study of less than one year. I am told that several young Porto Ricans after a visit to the United States extending over less than twelve months have returned to the island in possession of diplomas issued by

law schools, although they were not able to speak, read or write the English language. A few such diplomas were accepted as a compliance with the military order above mentioned before the matter had attracted general attention. Subsequent legislation gave to the supreme court of the island full authority to regulate the matter and that judicial body has taken steps to prevent the admission to the bar of persons not qualified by a more extended course of study.

THE ROUTINE WORK OF THE DEPARTMENT.

In the preparation of the new laws and measures presented to the legislative assembly this office was not inactive, and since its adjournment frequent demands have been made upon me by the several departments of government, by municipal officials and by private citizens for interpretation and construction of the new enactments or of some parts thereof. These matters, together with the growing bulk of the routine work of the department, soon overtaxed the capacity of the officials and employees. I was compelled therefore to apply to the governor for an appropriation for salaries for additional assistants from an emergency fund at his disposal. The department now has a law clerk, whose special duty is to look after the criminal docket and the details of cases pending in the courts in which the interests of the government are involved. It also has a health attorney specially charged with the duty of prosecuting infractions of the rules and regulations of the superior board of health. His activity has resulted in a conviction in every case presented by the board of health to this department for prosecution. An additional correspondence clerk has also been provided. The office seems now to be sufficiently equipped for any demands that are likely to be made upon it in the near future. I think it proper at this point to say that the zeal and loyalty of the members of the staff of this office under all circumstances during office hours and out of office hours has been a source of great gratification to me.

The number of cases in which interests of the insular government and of municipal governments are involved has largely increased during the year. Some of these cases relate to matters of large value and present intricate questions of law. But

these matters will be made the subject of a special report to you at a later date.

It is impossible to conclude this brief annual report without expressing to you my confident belief that substantial progress has been made during the year in the process of establishing American institutions in this island. So far as this department has come into contact with the people of Porto Rico during the year just ended, there has been manifested a cordial desire by all classes not only to know what is American in spirit and principle, but when informed to adopt it. I see no reason why the hope may not be indulged that in the progress of time this island will be the home of a strong and vigorous Spanish-speaking population American in sympathies and in all their aspirations.

I have the honor, sir, to remain,
Your obedient servant,

JAMES S. HARLAN,
Attorney-General of Porto Rico.

To the ATTORNEY-GENERAL OF THE UNITED STATES.

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